A **DREAM PROPERTY SDN BHD**

v.

ATLAS HOUSING SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
ANANTHAM KASINATHER JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: J-02-3018-12-2011]
C 14 MAY 2013

[Editor's note: This judgment has been published in [2013] 6 CLJ 541 without the dissenting judgment of Abu Samah Nordin JCA. We have since obtained the dissenting judgment and have decided to republish the case in full. Kindly disregard [2013] 6 CLJ 541].
D

CONTRACT: *Breach - Compensation - Obligation of person enjoying benefit of non-gratuitous act - Whether purchaser in breach of sale and purchase agreement may nevertheless claim costs of improvements done on*
E *land from vendor - Whether purchaser liable to pay vendor for use and occupation of land - Unjust enrichment - Pre-conditions for right of compensation - Contracts Act 1950, s. 71*

CONTRACT: *Breach - Remedies - Sale and purchase agreement -*
F *Agreement terminated due to purchaser's failure to pay balance purchase price - Purchaser let into possession of land before completion - Whether vendor entitled to terminate agreement, forfeit deposit and recover vacant possession of land - Whether purchaser liable to pay vendor for use and occupation of land*

G ***CONTRACT:*** *Breach - Repudiatory breach - Effect of repudiatory breach - Whether innocent party entitled to treat contract as terminated - Test for determining whether repudiatory breach accepted by innocent party*

H ***CONTRACT:*** *Breach - Sale and purchase agreement - Purchaser failing to pay balance purchase price within completion date - Time of essence - Whether repudiatory breach - Whether vendor entitled to terminate agreement, forfeit deposit and recover vacant possession of land - Purchaser let into possession of land before completion - Whether purchaser*
I *liable to pay vendor for use and occupation of land - Whether purchaser may claim cost of improvements done on land from vendor - Contracts Act 1950, s. 71*

CONTRACT: *Interpretation - Principles in interpretation of terms - Reasonableness and commerciality*

By a sale and purchase agreement dated 19 November 2004 ('the SPA'), the appellant contracted to purchase the respondent's land ('the land') covering an area of 14.4 acres at the price of RM33.5 million. The appellant paid a 10% deposit leaving a balance of RM30.15 million payable fourth months (with an automatic extension of two months) from the date the vendor confirmed that vacant possession was ready to be delivered. At the time of the execution of the SPA, the land had 40 squatters and a school located on it. The school occupied 0.75 acres or about 5% of the total land area. Special condition 4 of the SPA permitted the appellant to carry out construction works on the land immediately following the execution of the SPA. In addition, the respondent granted a power of attorney ('PA') in favour of the appellant. Effectively the appellant was provided with physical possession of 95% of the land shortly after the execution of the SPA. The SPA also, *inter alia*, provided that: (i) if the appellant fails to pay the balance purchase price on the completion date or the extended date, then, the SPA was to be automatically terminated and the deposit forfeited to the respondent and the contract to be treated as null and void and of no further effect; (ii) time was to be of the essence of the contract; (iii) special condition 1 – the respondent was to be given six months to clear the squatters and nine months to relocate the school (with an automatic extension of three months) prior to handing over of vacant possession of the land to the appellant; and (iv) special condition 3 – upon receiving vacant possession, the appellant was given four months (with an automatic extension of two months) to settle the balance of the purchase price. A joint inspection was conducted on 21 November 2005 by representatives of both parties to confirm compliance by the respondent with its obligation to clear the squatters and relocate the school with the view to delivering vacant possession of the said land to the appellant. Hence, the respondent claimed that the computation, for the purposes of determining the completion date, commenced on 22 November 2005 and consequently the completion date would fall on 21 March 2006. The school had four gates. Three of the gates were open giving unlimited access to the land to the appellant. However, the fourth gate was kept locked because of its proximity to a busy road. Upon the appellant's request, the respondent, on 28 February 2006, delivered the key to the fourth gate to the appellant. The appellant's solicitors subsequently claimed that vacant possession

was only delivered to the appellant on 28 February 2006 implying that the completion date was 30 June 2006. The respondent's solicitors responded maintaining that the completion date was 21 March 2006 and intimating that the respondent would terminate the SPA and forfeit the 10% deposit if the appellant fails to complete the SPA by this date. The respondent then filed the present suit stating that the extended completion date had expired on 21 May 2006 and consequently the 10% had been forfeited and demanded that vacant possession to be returned to it forthwith. Meanwhile, the appellant had completed the construction of a mall on the said land. The High Court allowed the respondent's claims and hence this appeal on the following issues: (i) when did vacant possession take place; (ii) whether the SPA was automatically terminated and, if not, otherwise validly terminated; (iii) whether the relationship between the parties was fiduciary in nature; (iv) the nature of the reliefs available to the respondent upon the valid termination of the SPA; and (v) the nature of the reliefs available to the appellant upon the SPA being validly terminated by the respondent bearing in mind that the appellant had completed the mall by 31 December 2006.

Held (dismissing appeal with costs)
Anantham Kasinather JCA (majority):

(1) Having regard to the principles of reasonableness and commerciality in the construction of the terms of the SPA, what was paramount to the appellant was the need to have possession of the land to construct the mall without any impediment by reason of the presence of the school, the children or the staff. This explained the rationale for the inclusion of special condition 1. The appellant acknowledged vacant possession to have been delivered on 21 November 2005 and by corollary 21 March 2006 to be the completion date. Hence, the position adopted by the appellant was untenable since special condition 1 was inserted for the appellant's benefit. (para 15)

(2) The significance of a breach amounting to a repudiation is that upon acceptance of the repudiation, the respondent is entitled to treat the contract as terminated; (*LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor*, refd). (para 18)

(3) The appellant's breach amounted to a repudiation because in all cases where time is of the essence of the contract, as was the case here, the law has treated failure to pay the purchase

price by the agreed date as amounting to a repudiation (*Ching Yik Development Sdn Bhd v. Setapak Heights Development Bhd*; refd, *Ganam Rajamany v. Somoo Sinniah*; refd). (para 18)

(4) The repudiatory breach of the appellant was accepted by the respondent applying the objective test propounded in *Mintye Properties Sdn Bhd v. Yayasan Melaka*. The letters from the respondent and the conduct of the respondent generally both before and after the last date for completion provided compelling evidence of the respondent having treated the SPA as terminated to the knowledge of the appellant after the May completion dateline. (para 20)

(5) The respondent's counsel's contention that the fiduciary relationship arose following the appellant's termination of the SPA was devoid of merit because the appellant adopted the position that the termination was unlawful; that the SPA continued to subsist; that the PA continued to subsist and consequently, the respondent was entitled to continue with the construction of the building. (para 28)

(6) The respondent had a right to the land following the automatic termination of the SPA pursuant to cl. 12. Upon termination, the respondent ceased to be liable to discharge the contractual obligation to transfer the land to the appellant and with it, the right to vacant possession of the land and the fixture in the form of the mall on the land and simultaneously forfeit the deposit. (*Selva Kumar Murugiah v. Thiagarajah Retnasamy*; foll). (para 31)

(7) The appellant proceeded with the construction of the mall when he had been expressly required to refrain from doing so. The appellant took the risk and following the judgment of the High Court in the respondent's favour, the appellant could not be seen to benefit from the use of what was in effect in law the respondent's land at all times. The use of the PA by the appellant to conclude sale and lease agreements was clearly beyond the authority of the appellant. This abuse of authority coupled with the finding of the trial judge that the appellant had acted in bad faith clearly justified the order requiring the appellant to account to the respondent for the benefits received by the use and occupation of the land and the mall following the termination of the SPA. A purchaser let into possession of land before completion of the contract is liable for the use and occupation of the land. (para 35)

(8) Apart from the common law principle of unjust enrichment, the party in breach is also entitled to compensation for any benefit conferred upon the victim pursuant to s. 71 of the Contracts Act 1950. The appellant was entitled to recover the costs of the construction of the mall. Section 71 is wider in scope than the doctrine of unjust enrichment. The appellant's claim for compensation met the three conditions required to establish the right of compensation under s. 71. These being: (i) the thing must be done lawfully; (ii) it must be done by a person not intending to act gratuitously; and (iii) the person for whom the act is done must enjoy the benefit of it. (para 42)

(9) The appellant continued the construction of the mall in the expectation of being successful in its claim for specific performance. It was not undertaken by the appellant to benefit the respondent gratuitously. Since the respondent did not seek the assistance of the court to demolish the mall but had acquired possession of the land and the mall pursuant to the order of vacant possession, the respondent clearly was in a position to enjoy the benefit of a completely constructed mall. (para 44)

Abu Samah Nordin JCA (dissenting):

(1) It was plain and obvious that this was not an ordinary SPA, pure and simple. The understanding between the parties was such that the purchaser would be permitted to enter into possession of the land immediately upon execution of the SPA to commence construction of the commercial complex. That was the intention of the purchaser when it purchased the land and the vendor knew it from the outset. It was a business-like transaction. When parties hold contrasting views on the date of delivery of vacant possession and on the extended completion date under the SPA, the court should lean in favour of a construction which is in accord with commercial realities (*Mars Equity Sdn Bhd v. Tis 'Ata' Ashar Sdn Bhd*; refd). (para 80)

(2) Notwithstanding what was stated in cl. 17 of the SPA that time, wherever stated was of the essence of the SPA, the vendor did not insist on strict compliance of the terms and conditions of the SPA. The respondent's conduct in its dealings with the appellant in relation to the payment of the

balance purchase price was obviously inconsistent with its contention that the balance purchase price must be paid by the extended completion date, *ie*, 21 May 2006. (para 81)

(3) The respondent, by its own conduct, was estopped from contending that the extended completion date was 21 May 2006 and that the balance purchase price must be paid by that date. Time was no longer the essence of the contract. It had waived its right to insist on strict performance of the contract. The appellant was not in breach of its contractual obligations when the balance purchase price was not paid by 21 May 2006. The extended completion date to pay the balance purchase price under special condition 3 fell on 28 August 2006. (para 84)

(4) This was a fitting case which justified appellate intervention. The trial court was plainly wrong in its construction of the terms and conditions of the SPA, in particular, special condition 3. There was insufficient judicial appreciation of the evidence by the trial court, which resulted in the wrong findings on the date of delivery of vacant possession and the extended completion date. The flawed assessment of the evidence had also resulted in the trial judge contradicting herself, which was self evident from her grounds of judgment. (para 93)

(5) Under special condition 3 and s. 10 of the Schedule, there must first be a joint inspection prior to confirmation by the purchaser of the delivery of vacant possession. The respondent's letter dated 28 February 2006 clearly showed that the keys and the school premises were handed over to the appellant on 28 February 2006. The appellant had not enjoyed quiet possession prior to that date, notwithstanding that the school had physically been relocated. (para 94)

(6) There was no total failure of consideration and that the appellant would be able to pay the balance purchase price on or before 31 August 2006. EON Bank could not release the balance purchase price as it failed to get an undertaking from the respondent or its solicitors, in spite of the appellant's solicitors' plea for them to respond on an urgent basis. (para 97)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Melalui satu perjanjian jual beli bertarikh 19 November 2004 ('PJB'), perayu memasuki satu kontrak untuk membeli tanah responden ('tanah tersebut') yang meliputi kawasan seluas 14.4 B ekar pada harga RM33.5 juta. Perayu membayar deposit 10% meninggalkan baki sebanyak RM30.15 juta yang perlu dibayar dalam tempoh empat bulan (dengan lanjutan automatik dua bulan) dari tarikh penjual mengesahkan milikan kosong sedia diberikan. Ketika pemeteraian PJB, 40 setinggan dan sebuah sekolah berada C di atas tanah tersebut. Sekolah tersebut meliputi 0.75 ekar atau kira-kira 5% jumlah kawasan tanah tersebut. Syarat khas 4 dalam PJB membenarkan perayu memulakan kerja-kerja pembinaan atas tanah tersebut dengan serta merta berikutan pemeteraian PJB tersebut. Tambahan lagi, responden memberikan surat kuasa wakil D ('PA') kepada perayu. Dengan itu, secara efektifnya perayu telah diberikan milikan fizikal 95% tanah sejurus selepas pemeteraian PJB. PJB tersebut juga, antara lain, memperuntukkan bahawa: (i) jika perayu gagal membayar baki harga belian pada tarikh penyelesaian atau lanjutan, maka PJB tersebut adalah batal secara E automatik dan deposit akan dilucuthakkan kepada responden dan kontrak tersebut dianggap sebagai batal dan tidak sah dan tidak mempunyai apa-apa kesan lanjut; (ii) masa adalah intipati kontrak; (iii) syarat khas 1 – responden akan diberikan masa enam bulan untuk menghalau setinggan-setinggan dan sembilan bulan untuk F menempatkan semula sekolah tersebut (dengan lanjutan automatik tiga bulan) sebelum milikan kosong tanah diberikan kepada perayu; dan (iv) syarat khas 3 – selepas menerima milikan kosong, perayu diberikan empat bulan (dengan lanjutan automatik dua bulan) untuk menyelesaikan baki harga belian. Satu pemeriksaan bersama G dilakukan pada 21 November 2005 oleh wakil daripada kedua-dua pihak untuk mengesahkan pematuhan oleh responden terhadap kewajipannya untuk menghalau setinggan-setinggan dan menempatkan semula sekolah dengan harapan untuk memberikan milikan kosong tanah tersebut kepada perayu. Maka, responden H menuntut bahawa pengiraan bagi tujuan menentukan tarikh penyelesaian bermula pada 22 November 2005 dan dengan itu, tarikh penyelesaian jatuh pada 21 Mac 2006. Sekolah tersebut mempunyai empat pintu pagar. Tiga daripada pintu pagar tersebut terbuka, dengan itu memberikan akses yang tidak terhad terhadap I tanah tersebut kepada perayu. Walau bagaimanapun, pintu pagar keempat sentiasa berkunci kerana berhampiran dengan jalan yang sibuk. Atas permintaan perayu, responden, pada 28 Februari 2006

telah menyerahkan kunci pintu pagar keempat kepada perayu. Peguamcara perayu kemudian menyatakan bahawa milikan kosong hanya diserahkan kepada perayu pada 28 Februari 2006, yang bermaksud bahawa tarikh penyelesaian adalah 30 Jun 2006. Peguamcara responden membalas dengan menegaskan bahawa tarikh penyelesaian adalah 21 Mac 2006 dan menyatakan bahawa responden akan membatalkan PJB dan merampas deposit 10% jika perayu gagal menyelesaikan PJB sebelum tarikh ini. Responden kemudiannya memfailkan tindakan ini dengan menyatakan bahawa tarikh penyelesaian yang dilanjutkan telah tamat pada 21 Mei 2006 dan dengan itu 10% telah dirampas dan menuntut milikan kosong dikembalikan kepadanya dengan serta merta. Sementara itu, perayu telah menyelesaikan pembinaan kompleks di atas tanah tersebut. Mahkamah Tinggi membenarkan tuntutan responden dan maka rayuan ini atas isu-isu berikut: (i) bilakah milikan kosong diberikan; (ii) sama ada PJB terbatal secara automatik dan jika tidak, sebaliknya terbatal secara sah; (iii) sama ada hubungan antara pihak-pihak adalah bersifat fidusiari; (iv) sifat relif-relif yang sedia ada untuk responden atas pembatalan sah PJB; dan (v) sifat relif-relif yang sedia ada untuk perayu jika PJB dibatalkan secara sah oleh responden dengan pertimbangan bahawa perayu telah menyiapkan kompleks sebelum 31 Disember 2006.

Diputuskan (menolak rayuan dengan kos)
Anantham Kasinather HMR (majoriti):

(1) Mempertimbangkan prinsip-prinsip kemunasabahan dan perdagangan dalam pentafsiran terma-terma PJB, apa yang penting kepada perayu adalah keperluan memperolehi milikan tanah untuk membina kompleks tersebut tanpa sebarang halangan atas alasan adanya sekolah, kanak-kanak dan kakitangan sekolah. Ini menjelaskan rasional bagi kemasukan syarat khas 1. Perayu mengakui bahawa milikan kosong telah diserahkan pada 21 November 2005 dan ekoran daripada itu, 21 Mac 2006 adalah tarikh penyelesaiannya. Maka, kedudukan yang diambil oleh perayu tidak boleh dipertahankan kerana syarat khas 1 telah dimasukkan bagi faedah perayu.

(2) Maksud kemungkiran membawa kepada penolakan adalah bahawa selepas penerimaan penolakan tersebut, responden berhak menganggap kontrak sebagai terbatal; (*LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor*, dirujuk).

(3) Pelanggaran oleh perayu bermaksud penolakan kerana dalam kesemua kes di mana masa adalah intipati kontrak, seperti dalam kes ini, undang-undang menganggap kegagalan membayar harga belian pada tarikh yang ditetapkan membawa kepada penolakan. (*Ching Yik Development Sdn Bhd v. Setapak Heights*, dirujuk); *Ganam Rajamany v. Somoo Sinniah*, dirujuk).

(4) Pelanggaran secara penolakan oleh perayu diterima oleh responden dengan menggunapakai ujian objektif yang dinyatakan dalam kes *Mintye Properties Sdn Bhd v. Yayasan Melaka*. Surat-surat daripada responden dan tindakan responden secara umumnya sebelum dan selepas tarikh akhir penyelesaian, memperuntukkan keterangan yang memberi penekanan bahawa responden menganggap PJB sebagai terbatal dengan pengetahuan perayu selepas tarikh penyelesaian Mei.

(5) Hujahan peguam responden bahawa hubungan fidusiari yang timbul berikutan penamatan PJB oleh perayu adalah tidak bermerit kerana perayu menggunakan kedudukan bahawa pembatalan tersebut adalah tidak sah; bahawa PJB tersebut masih kekal; bahawa PA masih kekal dan dengan itu responden berhak meneruskan pembinaan bangunan tersebut.

(6) Responden mempunyai hak ke atas tanah tersebut berikutan pembatalan automatik PJB menurut kl. 12. Selepas pembatalan, responden tidak lagi bertanggungjawab melepaskan kewajipan dari segi kontrak untuk memindah milik tanah tersebut kepada perayu dan dengan itu hak untuk milikan kosong tanah dan kelengkapan dalam bentuk kompleks atas tanah tersebut dan pada masa yang sama merampas deposit; (*Selva Kumar Murugiah v. Thiagarajah Retnasamy*, diikuti).

(7) Perayu meneruskan dengan pembinaan kompleks tersebut apabila dia telah disuruh secara langsung berhenti daripada berbuat demikian. Perayu mengambil risiko tersebut, dan mengikuti penghakiman Mahkamah Tinggi yang memihak kepada responden, perayu tidak boleh dilihat memperolehi faedah daripada penggunaan apa yang sebenarnya, pada setiap masa, adalah tanah responden dari segi undang-undang. Penggunaan PA oleh perayu untuk menamatkan perjanjian jualan dan pajakan adalah jelas di luar kuasa perayu. Penyalahgunaan kuasa ini bersama-sama dengan dapatan oleh hakim perbicaraan bahawa perayu telah bertindak dengan niat

jahat jelas menjustifikasikan perintah yang memerlukan perayu bertanggungjawab kepada responden bagi faedah yang diterima dengan penggunaan dan pendudukan tanah dan kompleks tersebut berikutan pembatalan PJB. Seseorang pembeli yang diberikan milikan tanah sebelum penyelesaian kontrak bertanggungjawab atas milikan dan pendudukan tanah tersebut.

(8) Selain daripada prinsip common law bagi pengkayaan tak patut, pihak yang mungkir juga berhak kepada pampasan bagi apa-apa faedah yang diberikan kepada mangsa menurut s. 71 Akta Kontrak 1950. Perayu berhak mendapatkan semula kos pembinaan kompleks tersebut. Skop s. 71 adalah lebih luas daripada doktrin pengkayaan tak patut. Tuntutan perayu untuk pampasan memenuhi tiga syarat yang diperlukan untuk membuktikan hak untuk pampasan di bawah s. 71. Ia adalah (i) perkara tersebut mesti dibuat secara sah; (ii) ia mesti dibuat oleh seseorang yang tidak berniat untuk bertindak secara yang tidak sepatutnya; dan (iii) orang yang baginya tindakan tersebut dilakukan mesti menerima faedahnya.

(9) Perayu meneruskan pembinaan kompleks tersebut dengan harapan agar berjaya dalam tuntutan pelaksanaan spesifiknya. Ia tidak dilakukan oleh perayu untuk faedah responden secara tidak sepatutnya. Oleh sebab responden tidak memohon bantuan mahkamah untuk merobohkan kompleks tersebut tetapi memperolehi milikan tanah tersebut berserta kompleks tersebut menurut perintah milikan kosong, responden jelas dalam kedudukan menikmati faedah daripada kompleks yang telah selesai dibina.

Abu Samah Nordin HMR (menentang):

(1) Adalah jelas dan nyata bahawa PJB ini bukan suatu yang biasa dan mudah. Persefahaman antara pihak-pihak adalah sebegitu di mana pembeli dibenarkan untuk mendapat milikan tanah setelah PJB dimeterai bagi memulakan pembinaan kompleks komersial. Ini merupakan niat pembeli apabila membeli tanah tersebut dan penjual mengetahuinya sejak awal. Ia seakan-akan transaksi perniagaan. Apabila pihak-pihak memegang kepada pandangan bertentangan berkenaan tarikh penyerahan milikan kosong dan tarikh penyelesaian yang dilanjutkan di bawah PJB, mahkamah seharusnya memihak kepada suatu pembinaan yang selaras dengan kebenaran komersial (*Mars Equity Sdn Bhd v. Tis 'Ata' Ashar Sdn Bhd*; dirujuk).

(2) Tanpa mengambil kira apa yang dinyatakan dalam kl. 17 PJB bahawa masa adalah intipati PJB, penjual tidak menuntut pematuhan tegas terma-terma dan syarat-syarat dalam PJB. Tindakan responden dalam pengendaliannya dengan perayu berkaitan bayaran baki harga belian adalah tidak konsisten dengan hujahannya bahawa baki harga belian mestilah dibayar sebelum tarikh pelanjutan penyelesaian, iaitu, pada 21 Mei 2006.

(3) Responden, melalui tindakannya sendiri, diestop daripada menghujahkan bahawa tarikh pelanjutan penyelesaian adalah pada 21 Mei 2006 dan bahawa baki harga belian mestilah dibayar sebelum tarikh tersebut. Masa bukan lagi intipati kontrak. Ia telah mengenepikan haknya untuk menuntut pelaksanaan ketat kontrak tersebut. Perayu tidak melanggar obligasi kontraknya apabila baki harga belian tidak dibayar sebelum 21 Mei 2006. Tarikh pelanjutan penyelesaian untuk membayar baki harga jualan di bawah syarat khas 3 jatuh pada 28 Ogos 2006.

(4) Campur tangan rayuan adalah wajar bagi kes ini. Mahkamah perbicaraan khilaf dalam pentakrifan terma-terma dan syarat-syarat PJB, terutamanya, syarat khas 3. Tidak terdapat penilaian kehakiman yang mencukupi oleh mahkamah perbicaraan terhadap keterangan yang menyebabkan penemuan salah atas tarikh penyerahan milikan kosong dan tarikh pelanjutan penyelesaian. Kesilapan menilai keterangan juga menyebabkan hakim perbicaraan mencanggah dirinya sendiri, yang jelas terbukti daripada alasan penghakiman beliau.

(5) Di bawah syarat khas 3 dan s. 10 Jadual, perlu ada pemeriksaan bersama sebelum pengesahan pembeli terhadap pemberian milikan kosong. Surat responden bertarikh 28 Februari 2006 jelas menunjukkan bahawa kunci dan premis sekolah telah diberikan kepada perayu pada 28 Februari 2006. Perayu tidak menikmati milikan aman sebelum tarikh itu, tanpa mengambil kira bahawa sekolah telah dipindahkan ke tempat lain.

(6) Tidak terdapat kegagalan balasan sepenuhnya dan bahawa perayu boleh membayar baki harga belian pada atau sebelum 31 Ogos 2006. EON Bank tidak dapat mengeluarkan baki harga jualan memandangkan ia gagal mendapatkan akujanji

daripada responden atau peguamcaranya, walaupun peguamcara perayu telah meminta mereka membalas dengan segera.

Case(s) referred to:

Attorney General v. Blake [2001] 1 AC 268 ***(refd)***
Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Charter Reinsurance Company Ltd v. Fagan (HL(E)) [1997] 12 AC 313 ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***
Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***
Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 FC ***(refd)***
Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***
Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd [2007] 6 CLJ 538 CA ***(refd)***
English v. Dedham Vale Properties Ltd [1978] 1 All ER 382 ***(dist)***
Federal Flour Mills Bhd v. Fima Palmbulk Services Sdn Bhd & Another Appeal [2005] 4 CLJ 47 CA ***(refd)***
Fibrosa v. Faibairn Ltd [1942] 2 All ER 122 ***(refd)***
Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***
Hayes v. Ross (No. 3) [1919] NZLR 786 ***(foll)***
Howard v. Shaw [1841] 151 ER 973 ***(refd)***
Johnson v. Agnew [1890] AC 367 ***(refd)***
Karuppannan Chellappan v. Chong Lee Chin [2000] 7 CLJ 265 HC ***(refd)***
LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***
Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors [2008] 1 CLJ 246 CA ***(refd)***
Mars Equity Sdn Bhd v. Tis 'Ata' Ashar Sdn Bhd [2005] 1 CLJ 513 CA
Martin v. Finch [1923] NZLR 570 ***(refd)***
Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***
Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC ***(refd)***
Mintye Properties Sdn Bhd v. Yayasan Melaka [2006] 4 CLJ 267 CA ***(foll)***
Mohd Zain Yusoff & Ors v. Avel Consultants Sdn Bhd & Anor [2006] 4 CLJ 31 CA ***(refd)***
Moreton v. Montrose Ltd [1986] 2 NZLR 496 ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***
New Zealand Shipping Co Ltd v. Societe des Ateliers et Chantiers de France [1919] AC 1 ***(refd)***
Ooi Boon Leong & Ors v. Citibank NA [1984] 1 LNS 26 PC ***(refd)***

P Palakrishnan Perianan v. Krishnamoorthy Sinniah & Anor [2001] 1 LNS 262 HC ***(refd)***
Photo Production Ltd v. Securicor Transport Ltd [1980] 1 All ER 556 ***(refd)***
Re Strand Music Hall Co Ltd [1865] 35 Beav 153 ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(foll)***
Tanwar Enterprises Pty Ltd v. Cauchi & Ors [2003] 201 ALR 359 ***(refd)***
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 40, 56, 66, 71
Rules of the High Court 1980, O. 14A
Specific Relief Act 1950, ss. 35, 36

Other source(s) referred to:
Dr Visu Sinnadurai, *Law of Contract,* p 243
JW Carter, *Breach of Contract,* 2nd edn, p 325
Pollock & Mulla, *Indian Contract & Specific Relief Act,* 11th edn, p 753

For the appellant - Cecil WM Abraham (Idza Hajar Ahmad Idzam with him); M/s Zul Rafique & Partners
For the respondent - Cyrus V Das (Gan Techiong, Steven Thiru, Faizal Moiden & Darmain Segara with him); M/s Gan & Lim

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-642-2006]

Reported by Amutha Suppayah

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] We do not propose in this judgment to set out in great detail the background facts since they are already set out in the judgment of the learned trial judge. However, the salient facts relevant for this judgment are that by the sale and purchase agreement dated 19 November 2004 ('the SPA'), the appellant contracted to purchase the respondent's land held under Geran 101840 Lot 325, Mukim Simpang Kanan, District of Batu Pahat, Johor ('the land') covering an area of 5.8274 hectares (14.4 acres) at the price of RM33.5 million. Pursuant to the terms of the SPA, the appellant paid the 10% deposit of RM3.35 million

leaving a balance of RM30.15 million payable four months from the date the vendor confirms that vacant possession is ready to be delivered and upon inspection and confirmation by the purchaser with automatic extension of two months with interest at 7% p.a payable in respect of the extended period.

[2] At the time of the execution of the SPA, the land had 40 squatters and a school known as Sekolah Rendah Hwa Nan ('the school') located on it. The school occupied 0.75 acres or about 5% of the total land area. By special condition 4 of the SPA the appellant was permitted to carry out construction works on the land immediately following the execution of the SPA. In addition, the respondent granted a power of attorney also dated 19 November 2004 ('PA') in favour of the appellant. Thus, effectively the appellant was provided with physical possession of 95% of the land shortly after the execution of the SPA and building plans executed by the respondent for submission to the local authorities.

[3] The salient terms and conditions of the SPA included *inter alia* the following:

(a) In the event the appellant fails to pay the balance purchase price on the completion date or the extended date, then, the SPA was to automatically terminate and the deposit forfeited to the respondent and the contract to be treated as null and void and of no further effect;

(cl. 12)

(b) Time was to be of the essence of the contract;

(s. 10 of the Schedule)

(c) Special condition 1 – The parties acknowledged being aware that currently there were … (40) squatters and the school on the land. The respondent was to be given six months from the date of the SPA to clear the said squatters and nine months to relocate the school prior handing over vacant possession of the land to the appellant. The parties expressly agreed that the respondent was to be given an automatic extension of three months to clear the squatters and relocate the school in the event the respondent failed to complete the aforesaid within the time stipulated hereinabove. Thereafter, the appellant had the option to extend the completion date in the

event the respondent failed to evict the squatters and relocate the school on the expiration of the automatic extension period.

(d) Special condition 3 – From the date the respondent confirms in writing that vacant possession is ready to be delivered to the appellant pursuant to special cl. 1 above and upon inspection and confirmation by the appellant, the appellant was given four months from the date thereof to settle the balance of the purchase price to the respondent, with an automatic extension of two months commencing from the expiry of the aforesaid four months provided that the appellant shall pay interest on the balance of the purchase price still unpaid at the rate of (7%) per annum until the full settlement of the balance purchase price.

[4] On the written request of the respondent's solicitors, a joint inspection was conducted by representatives of both parties to confirm compliance by the respondent with its obligation to clear the squatters and relocate the said school with the view to delivering vacant possession of the said land to the appellant. This joint inspection was undertaken on 21 November 2005, with Mr Yiap Toon Cheng ('DW1') representing the appellant and Mr Tang Pei Hau ('PW2') representing the respondent together with one Mr Edwin Tan. Following the joint inspection, the appellant's representative was presented with a document in the form of exh. D064 and required to execute the same. DW1 executed the same below the following words:

> I have jointly inspected the school site with Mr. Edwin Tan & Mr. Tang and confirm that the School administration has been relocated

written in his own handwriting.

[5] The following day by the letter of 22 November 2005 addressed to the appellant's solicitors, the respondent's solicitors confirmed the completion of joint inspection of the site and of the respective representatives being satisfied that the school had been relocated. By virtue of the contents of this letter, the respondent claimed that the computation for the purposes of determining the completion date commenced on 22 November 2005 and consequently the completion date would fall on 21 March 2006 with an extension of two months subject to payment of interest at 7% p.a. By letter of 29 November 2005, the appellant's

solicitors appear to accept the contents of the letter of 22 November 2005 save for seeking the inclusion of a proviso that the school building should not be demolished and the appellant allowed to use it in consideration of the appellant paying RM20,000 as contribution to the school. In their letter in reply of 21 December 2005, the respondent's solicitors confirmed their agreement to this proposal but insisted that this arrangement should not be a condition precedent to the handing over of vacant possession.

[6] The school that was on the land had four gates. Three of the gates were open giving unlimited access to the land to the appellant. However, the fourth gate was kept locked because of its proximity to a busy road. Upon the request of the appellant, the respondent by letter of 28 February 2006 delivered the key to the fourth gate to the appellant. Between 22 November 2005 and 7 March 2006, the appellant's solicitors did not dispute that vacant possession had been delivered to the appellant on 21 November 2005. The appellant's solicitors disputed the date when vacant possession was delivered and correspondingly the due date of completion for the first time *vide* their solicitor's letter of 8 March 2006. The solicitor's claimed that vacant possession was only delivered to the appellant on 28 February 2006 ie, the date when the key to the fourth gate was handed over to the appellant implying that the completion date was 30 June 2006 with a further two months extension thereafter. The respondent's solicitors responded by letter of 9 March 2006 disputing the appellant's latest claim by insisting that vacant possession had been delivered on 21 November 2005 and maintaining that the completion date was 21 March 2006. In the same letter, the solicitor for the respondent intimated their client's intention to terminate the SPA and forfeit the 10% deposit if the appellant failed to complete the SPA by this date or the extended date after payment of interest.

[7] As the dispute between the parties concerning the completion date could not be resolved, the appellant on 21 April 2006 filed an originating summon *vide* JBHC O/S 24-1418-06 ('OS') seeking the court's determination of this issue and for specific performance of the SPA. The OS was fixed for hearing on 11 October 2006. Thereafter, solicitors for EON Bank Berhad namely, Sharizat Rashid & Lee by letter of 21 August 2006 wrote to the respondent's solicitors informing them that the bank had conditionally granted to the appellant a loan facility of

RM25,000,000 to enable the latter to complete the SPA. At the same time, they requested the usual conveyancing confirmations and undertakings. The next day the appellant's solicitors by letter forwarded to the respondent's solicitors a bank draft for the differential sum of RM5.15 million. By this letter, the solicitors requested for the title deed and other usual conveyancing documents. This letter met with no response from the respondent and its solicitors.

[8] In the meantime, the respondent had filed the writ forming the subject matter of this appeal on 28 August 2006 without a statement of claim. Thereafter, *vide* letter dated 2 September 2006, they responded to the appellant's letters stating *inter alia* that the extended completion date had expired on 21 May 2006 consequently the 10% had been forfeited and demanded that vacant possession be returned to it forthwith. The respondent thereafter withheld the bank draft for the differential sum purportedly towards account of the damages payable by the appellant arising from the termination of the SPA. The appellant's solicitors replied by letter of 5 September 2005 reiterating its position that vacant possession took place on 28 February 2006 and stating it would seek specific performance of the SPA.

[9] On 8 September 2006, the respondent filed its statement of claim and on 12 September 2006, filed an application under O. 14A of the Rules of the High Court 1980 ('RHC'). By this application, the respondent sought the construction of cl. 12 and special conditions 1 and 3 of the SPA; a determination of the date of delivery of vacant possession and the date on which payment of the balance purchase price was due and payable under the SPA. On 13 September 2006, the respondent's solicitors wrote to the appellant's solicitors stating that they had filed an application to request an early hearing date and that the application contained a prayer to allow the respondent to withhold the RM5.15 million differential sum as security for damages until the appellant returned possession of the land.

[10] The High Court allowed the respondent's O. 14A application on 10 October 2006. By letter of 18 October 2006, the respondent's solicitors informed the appellant's solicitors that although there was an interim stay of the order requiring the appellant to return vacant possession, the appellant ought to cease all construction works. This was presumably to avoid increasing the size of the structure to be demolished later and to save

further construction costs. On 22 January 2007, the temporary certificate of fitness ('CFO') in the appellant's name was issued for the building constructed on the land, by then known as the Batu Pahat Mall ('mall').

[11] On 2 November 2007, the Court of Appeal dismissed the appellant's appeal. On 20 November 2007, the final CFO for the mall was issued. The Federal Court on 5 September 2008 granted leave to the appellant to appeal and on 8 June 2010, allowed the appeal with costs and set aside all the orders of the High Court. Following the orders of the Federal Court, the respondent's solicitors returned the differential sum of RM5.15 million to the appellant's solicitors. However, the appellant's solicitors returned the sum to the respondent's solicitors claiming that the respondent's acceptance of the sum in 2006 must be understood in the circumstances prevailing then. On 16 July 2010, the appellant's solicitors forwarded to the respondent's solicitors the balance sum of RM25 million but the latter returned the cheque on the same day.

Issues

[12] Although the learned trial judge identified and provided Her Ladyship's grounds in respect of nine issues, we propose to only deal with five issues for the purposes of this judgment. The issues being:

(i) When did vacant possession take place ('the first issue');

(ii) Whether the SPA was automatically terminated and, if not, otherwise validly terminated ('the second issue');

(iii) Whether the relationship between the parties was fiduciary in nature ('the third issue');

(iv) The nature of the reliefs available to the respondent upon the valid termination of the SPA ('the fourth issue'); and

(v) The nature of the reliefs available to the appellant upon the SPA being validly terminated by the respondent bearing in mind that the appellant had completed the mall by 31 December 2006 ('the fifth issue').

The First Issue

[13] Her Ladyship correctly recognised that the real issue between the parties to be whether vacant possession took place on 26 November 2005 as contended by the respondent or 28 February 2006 as contended by the appellant. The date of vacant possession being crucial since in accordance with the terms of special condition 3, the balance of the purchase price was payable four months (with two months automatic extension) from the date of vacant possession. The learned trial judge then correctly identified special conditions 1 and 3 as the clauses which provided the answer to the aforesaid issue. In the construction of the words in special condition 3, in our view, Her Ladyship should not have limited herself to construing the words in their grammatical and ordinary meaning as recommended by the court in *Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246; [2008] 1 AMR 672 but ought to have recognised the need to consider the factual matrix leading to the execution of the SPA and have regard to "considerations of reasonableness" or "commerciality" propounded by Justice Mance in *Charter Reinsurance Company Ltd v. Fagan (HL(E))* [1997] 12 AC 313 at p. 325. As Lord Hoffmann opined when this case reached the House of Lords that:

> I think that in some cases the notion of words having a natural meaning is not a very helpful one. Because of the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.

(see p. 391 of the judgment in the case of *Charter Reinsurance Company Ltd v. Fagan* (HL(E)).

On the particular facts of this case, the construction put forward by Justice Mance appeals to us because under the terms of the SPA, there were five special conditions dealing with the delivery of the unusual right to vacant possession and the commencement of construction even before the completion date. From the perspective of reasonableness, it is a relevant background fact that the school only occupied less than 5% of the land. Be that as it may, we are satisfied that Her Ladyship did have regard to the factual matrix in the construction of the words in the special conditions for the reasons set out below.

[14] On the first issue, counsel for the appellant contended that no relocation had taken place as the keys to some of the gates controlling access to the land were in the possession of the respondent even after 26 November 2005. The appellant relied on the respondent's letter dated 28 February 2006 accompanying the surrender of the keys as affording evidence of this. Secondly, according to counsel for the appellant the presence of furniture and timber belonging to the school on the land after 26 November 2005 and the retention of security guards on the land after this date went against the grain of the respondent's claim that the school had relocated prior that date. Finally that the alternative site for the school had not been provided with the relevant approvals thereby refuting the claim of the respondent that the school had relocated. The rationale being that any relocation prior the obtaining of approvals would be illegal.

[15] In our judgment, having regard to the principles of reasonableness and commerciality in the construction of the terms of the SPA, it must follow that what was paramount to the appellant was the need to have possession of the land so as to enable it to commence and thereafter continue with the construction of the mall without any impediment by reason of the presence of the school, the children and the staff of the school. This explains the rationale for the inclusion of special condition 1 whereby the appellant expressly required the respondent to warrant that it would clear the squatters and relocate the school within six months and nine months respectively. The learned trial judge clearly recognised this requirement in Her Ladyship's construction of the special conditions as evidenced by Her Ladyship's reasoning in para. 22 of Her Ladyship's judgment that special conditions 1 and 3 should be read together and that when read together the first issue required the respondent to satisfy four sub issues. These being:

(i) Whether the school had been relocated by 26 November 2005;

(ii) Whether the respondent had confirmed to the appellant in writing that vacant possession of the land was available on or before 26 November 2005;

(iii) Whether joint inspection had indeed been carried out on or before that date; and

(iv) Whether the appellant purchaser had confirmed in writing following the joint inspection that it was satisfied that the school had been relocated.

[16] Her Ladyship then proceeded to examine each of the appellant's claims for contending that vacant possession had not been delivered before 26 November 2005 in the context of each sub issue and made detail findings of fact in favour of the respondent on all four sub issues. With respect, this court should not interfere with Her Ladyship's findings of fact unless such findings of fact are plainly wrong (see *Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857 at p. 873). In our judgment, the findings of fact by the learned trial judge in favour of the respondent in respect of all the four sub issues were clearly justified based on the oral and documentary evidence led before the court.

[17] Be that as it may, we propose to highlight two factors, which, in our judgment, afford compelling evidence that vacant possession was indeed effected on 21 November 2005. First, following the execution of exh. B64 on 21 November 2005 by the appellant's representative (DW1) confirming in his own words that "the school administration has been relocated" there was an exchange of correspondence between the solicitors representing the appellant and the respondent. The respondent's solicitor's letter of 22 November 2005 expressly refers to the joint inspection undertaken on 21 November 2005 and to DW1 having confirmed that all the squatters had been evicted and the relocation of the school completed. The significance of the words in the respondent's solicitor's letter of 22 November 2005 is the close nexus between the words therein and the words in special condition 1 and the reference to the completion date being 21 March 2006. The appellant's solicitors letter in reply of 29 November 2005 did not dispute the contents of the respondent's solicitors letter save to make reference to an arrangement reached with the respondent's Dato' Tan that there was to be no dismantling of the school save with the appellant's consent. The respondent's solicitor's letter in reply to this letter of 21 December 2005 again reiterated the completion date to be 21 March 2006 with an extension two months together with late payment interest, without any challenge by the appellant or their solicitors. Accordingly, irrespective of whether DW1 was pressed into writing that the school had been relocated in exh. B64, there is irrefutable contemporaneous documentary evidence of the

appellant having accepted 21 March 2006 to be the completion date. Secondly, the respondent was required to relocate the school within 12 months of the SPA ie, by 21 November 2005 (including the allowed extended period), failure to do so would have rendered the respondent to be in breach of the SPA (see special condition 2). As there is no evidence of the respondent having sought any extension of time to relocate the school pursuant to special condition 1, it must necessarily follow that the respondent would have been in breach of special condition 1 for not having relocated the school on or before 21 November 2005. Yet, there is no evidence of the appellant or its solicitors having complained of any such breach on the part of the respondent at all. Again, in our judgment, the only reasonable inference to be drawn is that consistent with the contents of the appellant's solicitor's letter of 29 November 2005, the appellant acknowledged vacant possession to have been delivered on 21 November 2005 and by corollary 21 March 2006 to be the completion date. For this reason, we agree entirely with the learned trial judge in her conclusion in para. 50 of Her Ladyship's judgment that the position adopted by the appellant was untenable since special condition 1 having been inserted for the benefit of the appellant, it stands to reason that the appellant would have exercised its right to terminate the SPA pursuant to special condition 2 if the respondent was in breach as alleged by it during the trial.

The Second Issue

[18] The second issue is whether the appellant's breach was a breach of a fundamental term as understood in the case of *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675 or a fundamental breach as understood in the case of *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556 so as to entitle the respondent to treat the breach as a repudiation of the SPA. The significance of the breach amounting to a repudiation is that upon acceptance of the repudiation, the respondent is entitled to treat the contract as terminated. As explained by Justice of the Court of Appeal Sri Ram (as he then was) in *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434; [2007] 4 MLJ 1, unless the breach amounted to a repudiation, it was not open to the respondent to validly terminate the contract. In our opinion, there is no doubt that the breach of the appellant in this case amounted to a repudiation because in all cases where time is of the essence

of the contract, as is the case here, the law has treated failure to pay the purchase price by the agreed date as amounting to a repudiation (see *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd.*) Similarly, the Federal Court in the case of *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290 ruled likewise (see p. 294 of the judgment of the court). The position of the respondent in claiming that the SPA had been rendered null and void following the appellant's failure to pay the balance purchase price by the completion date is infinitely stronger by reason of cl. 12 of the SPA. Clause 12 provided for the SPA to be null and void upon default of the appellant in paying the balance of purchase price by the 'completion date' as understood in the SPA.

[19] The defence of the appellant, however, was that for there to be a valid termination of the SPA, the repudiation on the part of the appellant had to be accepted by the respondent by the issuance of a notice of termination. According to counsel for the appellant, bar such a letter of termination, the SPA continued to subsist. With reference to cl. 12 of the SPA which required no such notice, counsel relying on the case of *P Palakrishnan Perianan v. Krishnamoorthy Sinniah & Anor* [2001] 1 LNS 262; [2005] 5 MLJ 389 submitted that there is no such thing as automatic termination of a contract arising from a breach as the law requires the innocent party in such circumstances to make an election as to how he proposes to treat the breach. Counsel also contended that the whole concept of automatic termination is repugnant to ss. 40 and 56 of the Contracts Act 1950. In other words, upon the occurrence of a breach, the law requires the innocent party by words or conduct to communicate his decision to terminate to the party in breach. The court is then required to ascertain whether such a notice of termination was effectively communicated to the appellant so as to bring about the end of the contract. In this respect, counsel cited the case of *Mintye Properties Sdn Bhd v. Yayasan Melaka* [2006] 4 CLJ 267; [2006] 6 MLJ 420) as containing the principles of the objective test to be applied by a court of law in determining the validity of the termination of the SPA. A corollary to this submission was that if the termination was not valid, then, it follows that the SPA was still subsisting and consequently it was still open to the appellant to pay the balance of the purchase price. Since there was no such letter of termination, learned counsel for the appellant submitted that the High Court ought to have dismissed the respondent's prayer for the declaration that the SPA had been terminated.

[20] The response of learned counsel for the respondent was twofold. The first response was that since cl. 12 provided for automatic termination, there was no need to give notice accepting the repudiation to bring the contract to an end. The New Zealand case of *Moreton v. Montrose Ltd* [1986] 2 NZLR 496 was cited to us as authority for the proposition of law that a clause in the nature of cl. 12 is valid and enforceable. Accordingly, counsel submitted that the SPA was automatically terminated upon default in the payment of the balance of the purchase price by the stipulated March dateline or for that matter by the August dateline relied upon by the appellant. The second contention of counsel was that in any event applying the objective test propounded in the case of *Mintye Properties Sdn Bhd v. Yayasan Melaka* the respondent had terminated the SPA. In this respect, we were invited to have regard to the respondent's letter of 9 March 2006 forwarded to the solicitors for the appellant intimating that "our client should terminate the sale and purchase and forfeit the 10% deposit" in the event the 90 per cent balance purchase price is not paid by 21 March 2006 with the extension of two months with the late payment interest (see tab 26 RCB 1). Counsel submitted that the express communication of the intention to terminate contained in this letter coupled with the subsequent conduct of the respondent in forfeiting the deposit and treating the SPA as terminated, to the knowledge of the appellant, amounted to an election by the respondent for the purposes of the objective test spelled out in the case of *Mintye Properties Sdn Bhd v. Yayasan Melaka*. Furthermore, learned counsel for the respondent also contended that in the contemporaneous documents, the appellant's challenge had always revolved around its claim to have paid the purchase price by the August dateline and not because there had been no acceptance of the appellant's repudiation of the SPA by the respondent.

[21] In our judgment, there is some force in the submission of counsel for the appellant that under the common law where a promisor wrongly repudiates the contract in its entirety, the promisee has a choice, he or she may elect to accept the repudiation, treat the contract as at an end and sue for damages or waive the breach and seek specific performance of the same. The rationale is that the primary obligation to perform the promise may be substituted with the secondary obligation to compensate for the breach. Justice Sri Ram in *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* discussing the subject of the options open to the victim of a repudiatory breach opined:

> where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at and end and sue for damages. The rationale is that the primary obligation to perform the promise made its substituted with the secondary obligation to compensate the promisee for the breach. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting.

(see *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* at p. 440 (CLJ); p. 5 (MLJ)).

Similarly, in *Photo Production Ltd v. Securicor Transport Ltd*, Lord Wilberforce repeated his pronouncements in *Johnson v. Agnew* [1890] AC 367 on the subject of election to this effect:

> When there has been a fundamental breach or breach of condition, the coming to an end of the primary obligations of both parties to the contract at the election of the party not in default is often referred to as the 'determination' or 'rescission; of the contract or, as in the Sale of Goods Act 1893, 'treating the contract as repudiated'. The first two of these expressions, however, are misleading unless it is borne in mind that for the unperformed primary obligations of the party in default there are substituted by operation of law what I have called the secondary obligations.

[22] With respect, the submission of learned counsel for the appellant that there is no such thing as automatic termination is not supported by the authorities. The validity of an automatic termination clause as a contractual term was considered as early as 1919 by the Privy Council in the case of *New Zealand Shipping Co Ltd v. Societe des Ateliers et Chantiers de France* [1919] AC 1. Lord Atkinson delivering the leading judgment of the House opined in that case that:

> It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard … But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insists upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.

More recently in the case of *Moreton v. Montrose Ltd (Supra)*, the New Zealand Court of Appeal (Wellington) after considering the decision in *New Zealand Shipping Co Ltd v. Societe des Ateliers et Chantiers de France* had this to say about automatic termination clauses:

> A condition that a contract shall be void in a certain event is treated sometimes as meaning that the contract is then automatically at an end, sometimes as meaning that either party may then rescind it. On the first interpretation neither party is required to take positive steps to set the contract aside, although a party who wishes to take advantage of the fact that the contract is no longer in existence may be well advised to make his attitude clear, since if he acts in a way suggesting that he regards the contract as continuing he will be at peril of a finding of waiver, election or estoppels. On either of the two interpretations a party will disqualify himself from relying on the condition if he has brought the state of affairs about by his own default. The rule that a party cannot take advantage of his own wrong in fundamental.

JW Carter in the second edition of his book *'Breach of Contract'* supports the proposition of law that automatic termination clauses are valid subject to the qualification that the parties must expressly make known this intention on their part in the contract itself (see p. 325). With respect, this proposition of law is in no way in conflict with the doctrine of 'election' highlighted in the cases cited earlier in this judgment as there was no automatic termination clause in the contracts which formed the subject matter of consideration by their Lordships in those cases. Finally, the Privy Council recognised the right of parties to provide for legal consequences other than those which ensue at common law (See *Ooi Boon Leong & Ors v. Citibank NA* [1984] 1 LNS 26; [1984] 1 MLJ 222). This demolishes the submission that automatic termination clauses are void pursuant to ss. 40 and 56 of the Contracts Act 1950.

[23] In any event, we agree with the learned trial judge that the repudiatory breach of the appellant was accepted by the respondent applying the objective test propounded in *Mintye Properties Sdn Bhd v. Yayasan Melaka*. This is evident from the contents of the respondent's letter of 9 March 2006 wherein the respondent had made known to the appellant their intention to terminate in default of completion of the SPA by the May 2006 dateline or after the extended two month period. Furthermore, the

respondent had repeatedly made known to the appellant the last date for completion and of its intention to terminate the SPA and forfeit the deposit in default of receipt of the balance purchase price by that date. The conduct of the respondent subsequent to 21 May 2006 is also consistent with the respondent treating the SPA as terminated following the appellant's failure to pay the balance of purchase price by the May completion date. Accordingly, we are in agreement with the conclusion of the learned trial judge in paras. 100 to 102 of Her Ladyship's judgment that the letters from the respondent and the conduct of the respondent generally both before and after the last date for completion provide compelling evidence of the respondent having treated the SPA as terminated to the knowledge of the appellant after the May completion dateline.

The Third Issue

[24] Did the SPA result in the appellant being a trustee or a fiduciary for the respondent. If so, did the appellant act in breach of its duties as a trustee/fiduciary? On this issue, counsel for the respondent referred to prayer (i) of the respondent's amended statement of claim which reads as follows:

> A declaration that the defendant, who had taken vacant possession of the said land pursuant to the said agreement and Power of Attorney without settling the full purchase price, is a trustee and/or a fiduciary for the plaintiff.

The learned trial judge refused to grant prayer (i) and this refusal formed the subject matter of a cross appeal by the respondent.

[25] Learned counsel for the respondent in seeking to persuade us to overturn the decision of the learned trial judge invited us to have regard to the judgment of the Federal Court in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833 and more particularly to the passage at p. 863 of the reported judgment of the court to the following effect:

> … the judicial trend in modern times, particularly in Canada, New Zealand and Australia leans towards greater readiness of accepting the presence of fiduciary relationship in commercial transactions or arrangements even where the parties were at arm's length and stood on a relatively equal footing.

Counsel for the respondent submitted that our courts have accepted the principle of law that a fiduciary relationship exist between a vendor and a purchaser in the context of a sale of purchase of land. Counsel based his submission on the acceptance by our Federal Court in the case of *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11; [1995] 1 MLJ 513 of this proposition of law pronounced by Slade J in *English v. Dedham Vale Properties Ltd* [1978] 1 All ER 382. According to counsel, Slade J opined that a fiduciary relationship could arise in a typical sale and purchase of land if the terms of the contract and/or the conduct of the parties resulted in the purchaser using the land of the vendor without the consent of the vendor. The following passage in the judgment of Slade J was cited to us as authority for this proposition:

> (1) … for the sale and purchase of property … the purchaser, in the name of and purportedly as agent on behalf of the vendor, but without the consent or authority of the vendor, takes some action in regards to the property (whether it be the making of a planning application, a contract for the sale of the property, or anything else) which, if disclosed to the vendor, might reasonably be supposed to be likely to influence him in deciding whether or not to conclude the contract, a fiduciary relationship in my judgment arises between the two parties.
>
> (2) Such fiduciary relationship gives rise to the consequences that there is a duty on the proposed purchaser to disclose to the vendor … what he has done as the vendor's purported agent, and correspondingly, in the event of nondisclosure, there is a duty on him to account to him for any profit made in the course of the purported agency, unless the vendor consents to his retaining it.

According to counsel, our Federal Court in *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor (supra)*, adopted the pronouncements of Slade J and held the appellant to be a constructive trustee of and a fiduciary for the plaintiff in respect of the land forming the subject matter of the SPA on the facts of this case.

[26] The learned trial judge paid scant regard to the submissions of counsel on this issue as evidenced by Her Ladyship's dismissal of prayer (i) by allotting less than one page of Her Ladyship's long judgment to this aspect of the respondent's claim. Her Ladyship's rejection of prayer (i) was premised on a passage in the judgment

of Abdull Hamid Embong J (as His Lordship then was) in the judgment of the Court in *Karuppannan Chellappan v. Chong Lee Chin* [2000] 7 CLJ 265; [2000] 4 AMR 4375.

[27] In our judgment, Her Ladyship was right in refusing to make an order in terms of prayer (i). However, in the light of the substantial arguments that were addressed to us on this issue and since it formed the subject matter of the cross appeal, we propose to provide our own grounds to justify the decision of the learned trial judge. In our judgment, the three cases cited by learned counsel for the respondent are not authorities for the proposition that a purchaser who takes possession of land without settling the full purchase price pursuant to the SPA becomes a trustee or a fiduciary of the landowner in all cases. The authority of *English v. Dedham Vale Properties Ltd* cited to us as authority for this proposition is easily distinguishable since the facts in that case involved a purchaser who unknown to the vendor applied and obtained planning approval from the local municipality for the construction of a building on the land. Based on those facts, the court had little difficulty in holding that the conduct of the purchaser amounted to the purchaser acting as a self appointed agent of the vendor in making the planning application. Slade J in holding the purchaser to be in a fiduciary relationship provided the following reasons:

> My reasons may be put in the form of two general propositions. (1) Where during the course of negotiations for the contract for the sale and purchase of property, the proposed purchaser, in the name of and purportedly as agent on behalf of the vendor, but without the consent or authority of the vendor, takes some action in regard to the property (whether it be the making of a planning application, a contract for the sale of the property, or anything else) which, if disclosed to the vendor, might reasonably be supposed to be likely to influence him in deciding whether or not to conclude the contract, a fiduciary relationship in my judgment arises between the two parties. (2) such fiduciary relationship gives rise to the consequences that there is a duty on the proposed purchaser to disclose to the vendor before the conclusion of the contract what he had done as the vendor's purported agent, and correspondingly, in the event of non-disclosure, there is a duty on him to account to him for any profit made in the course of the purported agency, unless the vendor consents to his retaining it. In such circumstances, the person who, for his own private purposes, uses the vendor's

> name and purports to act as his agent cannot reasonably complain if the law subjects him to the same consequences *vis-à-vis* his alleged principal as if he had actually had the authority which the purported to have.

(see p. 399 of the reported judgment of the court).

[28] With respect, what distinguishes the facts of this case from the facts of our case is that the appellant and respondent were parties to the SPA *simpliciter* involving land. Admittedly, the appellant applied for planning approval and commenced construction of the mall on land belonging to the respondent prior the payment of the balance purchase price. However, unlike the fact situation in *English v. Dedham Vale Properties Ltd,* the appellant in this case was expressly authorised by the respondent to apply for planning permission and commenced the construction of the building on the land even before completion. The respondent's counsel's contention that the fiduciary relationship arose following the appellant's termination of the SPA is devoid of merit because in this case, the appellant adopted the position that the termination was unlawful; that the SPA continued to subsist; that the power attorney (PA) continued to subsist and consequently the respondent entitled to continue with the construction of the building. The fact that the Federal Court set aside the earlier judgment of the High Court and ordered the parties to determine these issues in a trial of the action must necessarily mean that these were 'live' issues to be determined by the High Court in a trial of these issues. With respect, pending the decision of the High Court on these 'live' issues, in our judgment, the respondent was entitled to take the position that the SPA and the PA continued to subsist and consequently the appellant entitled in law to continue with the construction of the mall.

[29] The case of *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* does not advance the respondent's case since that case is authority for the proposition that joint venturers owe fiduciary duties to one another. Similarly, the Federal Court case of *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* is of no assistance either since that case only concerned whether joint venturers are also partners. Chong Siew Fai FCJ (as he then was) in rejecting this proposition of law opined that:

> While joint venturers in an undertaking may owe certain fiduciary duties to one another, the existence of such duties does not necessarily make them partners under the act.

The Fourth Issue

Decision Of The High Court On The Relief Sought By The Respondent

[30] The prayers granted by Her Ladyship *inter alia* included the return of the land by the appellant to the respondent pursuant to s. 66 of the Contracts Act 1950; the forfeiture of the deposit based on the decision of this court in *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; [2005] 3 MLJ 585 and finally:

> for assessment of the income received from the sale and letting of the land and for all profits acquired by the defendant before the registrar to be paid to the plaintiff.

[31] In our judgment, the learned trial judge was right in ordering the return of the land although we prefer to base our decision for this order upon the respondent's right to the land following the automatic termination of the SPA pursuant to cl. 12 of the agreement. To adopt the analogy to cases relating to the rights of the victim of a repudiatory breach upon acceptance of the breach, the respondent was excused from the further performance of the SPA and entitled to the return of the land and damages. The rationale for this entitlement being that upon termination the respondent ceased to be liable to discharge the contractual obligation to transfer the land to the appellant and with it the right to vacant possession of the land and the fixture in the form of the mall on the land and simultaneously forfeit the deposit. In our judgment, following the decision of the Federal Court in the case of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374, the innocent party is entitled to forfeit the deposit so long as the deposit was provided as a guarantee for the performance by the appellant of its obligations under the SPA. The Federal Court in this case ruled that the innocent victim of a breach such as the respondent is entitled to forfeit any reasonable amount of earnest money or deposit paid to him under the contract. In this respect, the court accepted 10% of the purchase price as not being too large a sum to prevent it from being fully forfeitable. Under the SPA cl. 12 provided for the forfeiture of the 10% deposit.

[32] As regards the appellant's liability to account for all the income and profits acquired by the appellant from the use of the land and the mall during the period that it was in possession of the same prior completion, Her Ladyship based her decision on

two grounds. First, based on the pronouncements of Lord Nichols in the case of *Attorney General v. Blake* [2001] 1 AC 268. Lord Nichols delivering the leading judgment of the House in this case said that:

> My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression 'restitutionary damages'. Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionally remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

(at pp. 284-285 of the reported judgment of the court).

Her Ladyship's other justification was that there is an old common law principle that a purchaser let into possession of land before completion of the contract is liable for the 'use and occupation' of the land if the contract is not later completed (see *Howard v. Shaw* [1841] 151 ER 973).

[33] Counsel for the appellant launched a scathing criticism of this part of the learned trial judge's order requiring the appellant to account for income/profit to be assessed by the learned Registrar and thereafter to be paid by the appellant following such assessment. Counsel for the appellant submitted that such an order is contrary to established principles of law as it is settled law that relief for account of profits and/or income is only awarded in instances where it is established that there has been a breach of fiduciary duty. In this respect, counsel referred us to the following passage in the judgment of the court in *Mohd Zain Yusoff & Ors v. Avel Consultants Sdn Bhd & Anor* [2006] 4 CLJ 31 at p. 40; [2006] 6 MLJ 314 at p. 377 where the learned judge said that:

> [7] The main issue to be decided in this appeal by the appellants is whether the respondents are only entitled to profits, and not gross income derived by the appellants from their breaches. It is the appellants' case that the respondents are only entitled to profits and that the appellants should be allowed to make deductions for

> the expenditure incurred by them to earn the income. We are in agreement with the contention of the appellants and it is for this reason that this court had earlier ordered the SAR to take an account of the income and expenses incurred by the appellants and submit his findings to the court. on this point, we find support in the principle as applied in the Australian High Court case of *Warman International Limited & Anor v. Brian Dwyer & Ors* [1995] 2 CLJ 326. In that case, there was a breach of fiduciary duty by the general manager of the company ('the former employer') when he formed new companies to carry out the business of the former employer. The court *inter alia* held that in ascertaining the damages the former employer would be entitled, the appropriate order is for an account of profits of the business of the new companies before tax less an appropriate allowance for expenses, skill, expertise, effort and resources contributed by them

and the further passage in the judgment of this court in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607 at p. 667; [1996] 2 MLJ 265 at p. 442 stating that:

> there is, we find, little difficulty in this area of the law. A plaintiff who proves a case of breach of trust or of fiduciary relationship is entitled to a wide range of relief. He may ask for and obtain an account of profits. Or he may have a receiver appointed to recover money due to him. Or he may obtain damages. The appropriateness of the particular remedy depends very much upon the facts of each case. (see eg, the orders made in *Avel Consultants Sdn Bhd & Anor v. Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209.

[34] Learned counsel for the appellant submitted that arising from Her Ladyship's earlier finding that there existed no trust/fiduciary relationship between the parties, this order was plainly inconsistent with Her Ladyship's own earlier ruling. The inconsistency consisting of Her Ladyship dismissing prayer (i) but ordering the consequential relief in the form of the taking of accounts and payment of profit. A further criticism of this order was that Her Ladyship had ordered the appellant to not merely pay the profits but also all income derived from the mall. To the extent that income includes profits, counsel submitted that the order of court effectively rendered the appellant to be liable twice over for the income derived from its activities in the mall.

[35] With respect, there is no merit in the submission of learned counsel for the appellant. In our judgment, the learned trial judge was right to apply the principles of law enunciated by Lord

Nichols in *Attorney General v. Blake* on the facts of this case. We acknowledge that the principles of law enunciated by Lord Nichols is to apply in exceptional cases of breach of contract only. However, in our judgment, this is such a case. First, the appellant proceeded with the construction of the mall when he had been expressly required to refrain from doing so. Admittedly, he proceeded with the construction on the assumption that the SPA continued to subsist following the order of the Federal Court. However, the fact remains that the appellant opted to proceed with the construction when there was a genuine dispute as to whether the SPA had been terminated. In other words, the appellant took the risk and following the judgment of the High Court in the respondent's favour, the appellant cannot be seen to benefit from the use of what was in effect in law the respondent's land at all times. In other words, the appellant was for all intents and purposes a trespasser on the respondent's land following the automatic termination of SPA in May 2006. The appellant may well argue that the respondent could have prevented this state of affairs by obtaining an injunction from the court to restrain it from continuing with the development on the land. With respect, there is no such obligation on the respondent. Furthermore, there is no certainty that a court of law would have granted such an injunction as damages may very well have been considered an adequate remedy since the injunction would have only resulted in the presence of an abandoned building on the land. Secondly, the use of the PA by the appellant to conclude sale and lease agreements was clearly beyond the authority of the appellant. This abuse of authority coupled with the finding of the learned trial judge that the appellant had acted in bad faith clearly justified the order of the learned trial requiring the appellant to account to the respondent for the benefits it received by the use and occupation of the land and the mall following the termination of the SPA.

[36] Furthermore, we are in agreement with Her Ladyship that a purchaser let into possession of land before completion of the contract is liable for the use and occupation of the land based on the decision of the English Court in *Howard v. Shaw* [1841] 151 ER 973. The Supreme Court of Auckland in the case of *Hayes v. Ross (No. 3)* [1919] NZLR 786 opined that there is no reason why the right of compensation of a wronged vendor in a sale and purchase agreement for the sale of land should be limited to an account for the rents only by a purchaser in possession of his land prior completion. The court reasoned that it could:

> see no actual difference between the fruits of possession in the shape of rent collected from tenants and the advantage derived from the use of the land

(at p. 791).

With respect, we share the opinion expressed by Chapman J in *Hayes v. Ross* in supporting the ruling of the learned trial judge that the appellant must account to the respondent for the benefits derived by the appellant by way of rental income and sale proceeds of the units constructed on the land while in possession of the land till the surrender of possession of the land and the mall to the respondent. In this respect, we note that the pronouncements of Chapman J in *Hayes v. Ross* have since been approved and followed by Herdman J in *Martin v. Finch* [1923] NZLR 570 and cited with approval by Dr Visu Sinnadurai in his book *Law of Contract* (see p. 243).

[37] We agree with the submission of learned counsel for the appellant that the learned trial judge should not have ordered for the appellant to be liable to the respondent for both income and profits bearing in mind that the law is concerned to only compensate the victim of the breach for its losses and not enrich the victim. However, in our judgment, in fact, the learned trial judge only ordered the appellant to pay the profits and not the income. This is evident from para. 129 of Her Ladyship's judgment which reads as follows:

> I therefore ordered for assessment of the incomes received from the sale and letting of the land and for all profits acquired by the defendant before the registrar to be paid to the plaintiff.

In other words, what Her Ladyship ordered was for all of the income derived by the appellant to be assessed by the learned Registrar and thereafter for the appellant to pay the ensuing profits derived from such income only to the respondent.

The Fifth Issue

Decision Of The High Court On The Relief Sought By The Appellant

[38] Apart from disputing the respondent's claim that the appellant was in default in the payment of the balance purchase price by the due date under the SPA, the appellant also sought to resist the respondent's claim on the ground that the building to be constructed under the SPA had been completed and was

of considerable value presently. For this reason, learned counsel for the appellant contended that to allow the respondent to rescind the SPA and grant vacant possession of the land to the respondent would be unjust and consequently the appellant's relief for specific performance the more appropriate remedy in all the circumstances of this case. This submission found no favour with the learned trial judge and, in our judgment, rightly so, since it is settled law that a court of law will not preclude a wronged vendor from exercising its right to forfeiture of the land or recovering the land following the lawful termination of the sale and purchase agreement solely on the ground that this would result in the respondent enjoying a 'windfall'. Our courts and the courts in Australia have consistently distinguished between cases where the vendor seeks to invoke the right to rescission of the agreement in equity (see s. 36 of the Specific Relief Act 1950) so as to render the contact void *ab initio* and common law rescission following the lawful termination which merely affects obligations *de futuro* (see *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* and *Tanwar Enterprises Pty Ltd v. Cauchi & Ors* [2003] 201 ALR 359). For instance, the Federal Court in *Ganam Rajamany v. Somoo Sinniah* opined that rescission of a contract in writing in equity cannot be adjudged unless the party against whom it is ordered can be restored to substantially the same position as if the contract had not been made based on s. 35 of the Special Relief Act 1950. On the facts of this case, it is evident from prayer (d) of the respondent's statement of claim that the respondent was merely seeking the assistance of the court to declare the SPA lawfully terminated resulting in the agreement being rendered void.

[39] The alternative submission of learned counsel for the appellant was that if the land was to be returned to the respondent with vacant possession, then, at the very least, the learned trial judge should have ordered the respondent to compensate the appellant to the extent of the market value of the completed building and not just the cost of construction of the same, as ordered by the learned trial judge. According to learned counsel, the learned judge after having erroneously concluded that the appellant's breach amounted to a total failure of consideration then proceeded to order damages and delivery of vacant position of the land, when, in law, the victim of a breach cannot obtain both damages and rescission of the contract. Learned counsel for the appellant cited a passage in the judgment of Gopal Sri Ram

FCJ (as His Lordship then was) in the case of *Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 in support of this proposition.

[40] Learned counsel for the respondent on the other hand submitted that the learned judge should not have ordered the respondent to even pay the costs of construction of the building to the appellant since such an award amounts to rewarding the appellant for its wrongful conduct. Learned counsel for the respondent submitted that the simultaneous order for the return of the land, the recovery of the profits made by the appellant and the respondent being allowed to retain the building did not amount to a case of unjust enrichment since the appellant continued with the construction of the building after having been required to refrain from continuing with the construction following the failure by the appellant to pay the balance of purchase price by the due date under the SPA. Against this background, learned counsel for the respondent contended that to allow the appellant to recover even the cost of the construction of the building would amount to allowing the appellant contract breaker to take advantage of, or obtain benefits from its wrongdoing, which is not allowed in law. In support of this proposition, counsel referred us to the passage in the judgment of the Federal Court in the case of *Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd*, where Gopal Sri Ram FCJ (as he then was) said:

> A contract breaker must pay damages to the innocent party. However, if he has made any payment under the contract (not being a true deposit for the purchase of movable or immovable property) the contract breaker is entitled to set off that payment against the damages he has to pay. However, he cannot seek to recover any benefit he may have conferred upon the innocent party where he is himself guilty of a breach of contract. Were it otherwise, a contract breaker will be in a position to take advantage of his own wrong. This is against principle and the policy of the law

at p. 290 (CLJ); p. 615 (MLJ).

[41] Learned counsel for the respondent also submitted that the doctrine of unjust enrichment is rooted in equity and there is no basis to benefit the appellant based on equitable principles having regard to the finding of bad faith on the part of the appellant by the learned judge. Counsel then referred to the authority of *Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd* [2007]

6 CLJ 538 and submitted that since the appellant had not come to court with clean hands, this court should not extend to it equitable relief based on unjust enrichment principles.

[42] In dealing with the respective submissions of both counsel, the learned judge opined that the doctrine of unjust enrichment whereby the victim of a breach is required to compensate the party in breach is not based on whether the victim is guilty of misconduct but on conscience. Her Ladyship relied on the passage in the judgment of Lord Wright in *Fibrosa v. Faibairn Ltd* [1942] 2 All ER 122 to the following effect:

> It is clear that any civilized system of law is bound to provide remedies for … unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or it tort, and are not recognized to fall within a third category of the common law … called quasi-contract or restitution

as the basis for this opinion. According to Her Ladyship, apart from the common law principle of unjust enrichment, the party in breach is also entitled to compensation for any benefit conferred upon the victim pursuant to s. 71 of our Contracts Act 1950. For this reason, Her Ladyship opined that following her decision to allow the respondent vacant possession of the land and for the receipt by them of the profits received by the appellant by the occupation and use of the land, the only question that remained to be answered was:

> Whether it was conscionable to allow the plaintiff to receive a windfall (the mall) to the tune of hundreds of million of ringgit irrespective of the conduct of the parties or whether or not any party might have a wrong or a breach.

(see para. 134 of the judgment of the court).

Her Ladyship proceeded to answer this question in the negative and consequently ordered that there be an assessment before the Registrar of the costs of the construction of the mall and for such costs following the assessment to be paid by the respondent to the appellant.

[43] Her Ladyship did not provide any reasons why Her Ladyship only ordered for the compensation to take the form of the costs of construction and not the market value of the mall in Her Ladyship's judgment of 11 November 2011. We were initially inclined to substitute the learned judge's order with an order that the respondent pay the market value of the mall. Our inclination to do so was influenced by the fact that the appellant had good reason to complete the building in a hurry. This reason being the need to complete the construction before Chinese New Year in early 2007. However, on a careful consideration of the implications of such an order, we are persuaded that the order made by the learned judge that the compensation be limited to the costs of construction is the proper order to be made in all circumstances of this case. In our opinion, the market value of the mall is inextricably linked to the value of the land. As such, in our judgment, to make an order for the respondent to pay the market value of the mall would effectively enable the appellant to benefit from any appreciation in the value of the land notwithstanding being the contract breaker. Accordingly, to order compensation based on market value would, with respect, amount to allowing the contract breaker to benefit for his wrong. This would be contrary to the pronouncements of the Federal Court in its judgment in *Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd (supra)*.

[44] We are also in agreement with Her Ladyship that the appellant is entitled to recover the costs of the construction of the mall under the alternative route of s. 71 of the Contracts Act 1950. It is generally accepted that s. 71 is wider in scope than the doctrine of unjust enrichment as applied under England law (see p. 753 of *Pollock & Mulla* 11th edn.). In our judgment, the appellant's claim for compensation meets the three conditions required to establish the right of compensation under s. 71. These being:

(i) The thing must be done lawfully;

(ii) It must be done by a person not intending to act gratuitously; and

(iii) The person for whom the act is done must enjoy the benefit of it.

(see p. 756 of *Pollock & Mulla* 11th edn.).

In our opinion, the continued construction of the mall notwithstanding the respondent's order that the appellant refrain from doing so is nevertheless 'lawful', since the validity of the termination of the SPA was not settled until the decision of the High Court on 11 November 2011. Secondly, the PA continued to subsist not having been revoked by the respondent. The second condition is clearly fulfilled since the appellant continued the construction of the mall in the expectation of being successful in its claim for specific performance. It most certainly was not undertaken by the appellant to benefit the respondent gratuitously. Finally, since the respondent does not seek the assistance of the court to demolish the mall but has acquired possession of the land and the mall pursuant to the order of vacant possession, the respondent clearly is now in a position to enjoy the benefit of a completely constructed mall.

Conclusion

[45] We confirm all the orders made by the learned trial judge save to clarify that the order requiring the appellant to account to the respondent for the use and occupation of the land and the mall is limited to having to pay the respondent only the profits so derived following assessment by the learned Registrar. We order the appellant to pay the costs of this appeal in the amount of RM30,000 to the respondent. We order the deposit to be paid to the respondent towards account of such costs.

Abu Samah Nordin JCA:

[46] This is an extraordinary case. It is extraordinary as what appeared to be a straightforward sale of an undeveloped piece of land by the vendor ('the respondent') to the purchaser ('the appellant') had generated intense dispute between the contracting parties over the proper construction of the sale and purchase agreement ("the SPA") dated 19 November 2004 which ended with the purchaser being the loser and ordered by High Court to redeliver the said land together with the completed commercial complex thereon, known as the Batu Pahat Mall.

[47] The vendor is the registered owner of the land held under Grant 101840 Lot 325 Mk Simpang Kanan, Batu Pahat, Johor ('the said land') measuring approximately 5.8274 hectares (14.4 acres). The purchaser had agreed to purchase the land at a

purchase price of RM33.5m from the vendor with the intention of developing it into a commercial complex. The appellant had paid a sum of RM3,350,000 as deposit and part payment towards the purchase price upon the execution of the SPA. At the date of purchase of the land there were 40 squatters on the land and an old school premises of Sekolah Jenis Kebangsaan (C) Hwa Nan ('the school') occupying about 0.75 acres or 5.2% of the land. The category of land use is for commercial development. It is agreed between the parties that the land is to be sold free from all encumbrances.

[48] The salient terms and conditions of the SPA which govern the relationship of the parties are set out below. The appellant's intention of purchasing the land is expressly stated in the recital to the SPA. The intention is to purchase the land, free from encumbrances and with vacant possession for the purpose of a commercial development. The second recital to the SPA states that the agreement is subject to the general and special conditions therein.

General Conditions

[49] The general conditions are contained in cls. 1-23. Clause 1 to the SPA states that the purchaser agrees to purchase the land for a consideration of RM33.5m free from all encumbrances, interests, easements, caveats, restrictions-in-interest and with vacant possession.

[50] Clause 3(b) of the SPA states that the vendor shall execute a valid and registrable memorandum of transfer in favour of the purchaser or his nominee upon execution of the SPA.

[51] Clause 5 of the SPA states that the purchaser shall be let into possession of the said land on the date of full payment of the purchase price made at the office of the vendor's solicitors.

[52] Clause 11 of the SPA states:

> In the event that the Purchaser is unable to pay the balance of the purchase price on the Completion Date as stated in Section 10 of the Schedule hereto, then the Vendor shall grant the Purchaser an extension of time in the manner provided for in Section 12(a) of the Schedule hereto (hereinafter called "the Extended Completion Date") to pay same PROVIDED the

Purchaser shall pay to the Vendor interest at the rate prescribed in Section 12(b) of the Schedule hereto on the balance of the purchase price still due and owing to the Vendor until such time when such balance of the purchase price shall have been fully paid.

[53] The completion date for the purchaser to pay the balance purchase price of RM30,150,000 is four months from the date the vendor confirms in writing that vacant possession is ready to be delivered to the purchaser and upon inspection and confirmation by the purchaser.

[54] Clause 12 of the SPA states that in the event the purchaser failing or neglecting to pay the balance of the purchase price on the completion date or on the extended completion date, whichever is applicable a sum equivalent to the sum stated in s. 7 of the Schedule shall be forfeited to the vendor whereupon the SPA shall be treated as null and void and of no further effect. The sum as stated in s. 7 of the Schedule is RM3,350,000.

[55] The extended completion date is two months from the expiry of the four months of the completion date.

[56] Clause 17 stipulates that time wherever mentioned shall be of the essence of the SPA.

[57] Clause 23 of the SPA provides that in the event of any inconsistency or repugnancy between the terms in the general conditions and special conditions, the terms in the special conditions shall prevail over the terms in the general conditions.

Special Conditions

[58] The special conditions are:

1. The parties hereto are aware that currently there are forty (40) squatters and a Chinese school on the said Property. The Vendor shall be given six (6) months from the date of the Sale and Purchase Agreement to clear the said squatters and nine (9) months to relocate the said School in order to hand over vacant possession of the said Property to the Purchaser. Within six (6) months from the date of this Agreement, the Vendor shall evict the forty (40) squatters and upon confirmation by the Purchaser of the aforesaid, the Purchaser shall pay to the Vendor a further sum equivalent to 2.5% of the Purchase Price. If the Vendor is unable to evict the said squatters within the said 6 months period, the

Vendor shall not be entitled to the said sum early and the balance purchase price shall therefore be payable within the time stated in Section 10 of the Schedule hereto. The parties hereby expressly agree that the Vendor shall be given an automatic extension of three (3) months from the expiry of the time stipulated hereinabove (hereinafter referred to as "the Automatic Extension Period") to clear the squatters and relocate the school in the event the Vendor fails to complete the abovesaid within the time stipulated hereinabove. Thereafter, the Purchaser shall have the option to extend the completion date in the event the Vendor fails to evict the squatters and relocate the school after the Automatic Extension Period.

2. In the event the Vendor fails to fulfil its obligation under Clause I above, the Purchaser shall have the option to either terminate this Agreement and ask for a refund of all money paid by the Purchaser (in which event the Vendor shall refund all such monies within seven (7) days upon the Purchaser's or the Purchaser's Solicitors' request) or to take all necessary steps to clear the squatters and thereafter to deduct all costs and expenses incurred by the Purchaser in carrying the aforesaid from the purchase price payable to the Vendor.

3. From the date that the Vendor confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause I above and upon inspection and confirmation by the Purchaser, the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchase Price of the Vendor, with an automatic extension of two (2) months commencing from the expiry of the aforesaid four (4) months provided that the Purchaser shall pay interest on the balance of the Purchase Price still unpaid at the rate of seven percentum (7%) per annum calculated from the commencement of the extended period until the full settlement of the balance Purchase Price.

4. In order to expedite matters, the Vendor shall allow the Purchaser to gain access to the said Property upon execution of the sale and Purchase Agreement to carry out all relevant works pertaining to the land, including but not limited to construction and in the event the Purchaser's construction shall affect the Vendor's obligation to remove the squatters or the school by virtue of or as a result of any legitimate complaint pertaining to the squatters' of the school's legal rights, the Purchaser shall immediately take such steps that are necessary to resolve the problem created or rectify any

inconveniences, losses, damages or injuries caused and keep the Vendor indemnified against all of the above. However, it is hereby expressly agreed by the parties that the Purchaser shall not erect any signboard on the said Property until the settlement of the issue on compensation with the squatters and the school.

5. The Vendor shall assist the Purchaser in any manner possible in respect of submission of amended plans for the construction of commercial building on the said Property for the approval of local authority, including granting a power of attorney of the Purchaser for such purpose upon the execution of the Sale and Purchase Agreement. Upon execution of this Agreement, the Vendor shall also have fully paid all consultant costs incurred up to the date of the execution of the Sale and Purchase Agreement and obtained from all consultants a letter of release stating that they have no further claim against the said Property in the Vendor has commenced to make applications to the relevant authorities.

[59] The crux of the dispute between the parties revolves on two issues:

(i) the date of delivery of vacant possession; and

(ii) the date of completion ('the completion date') of the SPA.

The completion date is dependent on the date of delivery of vacant possession. The respondent contends that the date of delivery of vacant possession is 21 November 2005 and the completion date under s. 10 of the Schedule is 21 March 2006, that is, four months from the date of joint inspection; and that the extended completion date is 21 May 2006. The appellant however contends that the date of delivery of vacant possession is 28 February 2006 and that the completion date under s. 10 of the Schedule is 30 June 2006; and that the extended completion date is 31 August 2006. The date of completion of the SPA is of vital importance to the parties as that is the date that determines which party is at fault or in breach of the SPA. In my view this is not only a matter of construction of the relevant terms of the SPA but it involves a critical analysis of the evidence before the court.

A **Facts In Brief**

[60] Now for a better understanding of the issues before us, I propose to set out in brief the facts in the instant appeal:

B (i) (a) On 19 November 2004 the parties executed the sale and purchase agreement of the said land. The purchase price is RM33,500,000. The appellant paid the respondent a sum of RM3,350,000 as deposit upon the execution of the SPA.

C (b) On the same date the respondent executed a power of attorney in favour of the appellant.

(ii) On 16 November 2005 the respondent's solicitors informed the appellant's solicitors in writing that the land was ready for delivery of vacant possession.

D (iii)(a) On 21 November 2005 the appellant's and the respondent's representatives conducted a joint inspection of the land pursuant to special condition 3 of the agreement in order to determine the date of delivery of vacant possession agreeable to both parties.

E (b) Following the joint inspection the respondent's solicitors informed the appellant's solicitors in writing that the completion date for the purchase of the land according to the terms of the SPA would fall on 21 March 2006, with an automatic extension of two months with late payment interest at the rate of 7% p.a. That was the final date that the balance purchase price must be settled.

F

G (iv) On 21 December 2005 the respondent's solicitors sent a reminder to the appellant's solicitors that the completion date of the purchase of the land was on 21 March 2006.

H (v) On 9 January 2006 the appellant's solicitors replied that the appellant was agreeable to the content of the respondent's letter dated 21 December 2005 provided that the respondent gave a written confirmation and/or warranty that with the handing of vacant possession the appellant should enjoy quiet possession and that there should be no further interference from the school.

I

(vi) On 28 February 2006, the respondent, by a covering letter, marked "Serahan Dengan Tangan" handed over the keys/premises of the school, to the appellant.

(vii) On 8 March 2006, the appellant's solicitor informed the respondent's solicitors in writing that the appellant had not enjoyed quiet possession of the land until the keys to the school premises were handed over by the appellant on 28 February 2006.

(viii) On 9 March 2006 the respondent's solicitor reminded the appellant's solicitors that appellant's representative had during the joint inspection on 21 November 2006 acknowledged or accepted vacant possession to the said land. Therefore the completion date would fall on 21 March 2006 with an extension of two months, failing which the respondent would terminate the SPA and forfeit the 10% deposit paid. The respondent also reserve the right to claim for all damages including having the land be restored to its original conditions and applying for an injunction to stop further construction which had started since vacant possession was handed over on 21 November 2005.

(ix) On 21 March 2006 the respondent's solicitors notified the appellant's solicitors that the extended completion date would commence from 22 March 2006 with late payment interest payable at the rate of 7% p.a until 21 May 2006.

(x) On 30 June 2006 EON Bank approved the appellant's application for banking facilities in the form of overdraft in the sum of RM5,000,000 and a term loan in the sum of RM100,000,000, out of which a sum of RM25,000,000 was to part finance the purchase of the said land.

(xi) On 21 August 2006 EON Bank's solicitors informed the respondent's solicitors that it had approved a loan of RM25m for the appellant to complete the purchase of the said land. This money was however not paid to the respondent as the bank did not receive an undertaking from the respondent's solicitors to refund the said sum if the transfer of title to appellant could

not be registered. The respondent however contended that the appellant could not raise the loan on or before 21 May 2006.

(xii) On 22 August 2006 the appellant's solicitors couriered a bank draft in the sum of RM5.15m, to the respondent's solicitors, being the differential sum between the purchase price and the sum approved by EON Bank to part finance the purchase of the said land. The bank draft was cashed and the money kept in the solicitors' client account.

(xiii) On 30 June 2010 (about three years ten months later) the respondent's solicitors returned the differential sum of RM5.15m to the appellant's solicitors.

The full facts of the case before us had been sufficiently set out in the judgment of the learned Judicial Commissioner. It is not in dispute that the respondent did not take any action to terminate the SPA after the expiry of the completion date on 21 May 2006. Nor did the respondent reject the differential sum when it was paid to the respondent's solicitors. Its reason for retaining the differential sum is to hold it as security for damages.

[61] It is clear from the exchanges of letters between their solicitors, that the contracting parties to the SPA could not come to a consensus on the date of delivery of vacant possession and the date of completion. The appellant contended that the extended completion date was on 31 August 2006 and as such it did not settle the balance purchase price of the land by 21 May 2006, that is, the extended completion date as contended by the respondent.

Writ Action

[62] On 28 August 2006 the respondent commenced an action against the appellant for several reliefs, including, in particular the following declarations and/or orders:

(a) A declaration that vacant possession of the land known as Geran No. 101840 Lot No. 325 Mukim Simpang Kanan, Daerah Batu Pahat was given by the plaintiff to the defendant on 21 November 2005;

(b) A declaration that the defendant has failed to pay to the plaintiff the balance purchase price and interest for extension of time on or before 21 May 2006, and as such the deposit of 10% of the purchase price paid by the defendant be forfeited by the plaintiff;

(c) The defendant is to return vacant possession of the land known as Geran No. 1 101840 Lot No. 325 Mukim Simpang Kanan, Daerah Batu Pahat to the plaintiff;

(d) A declaration that the sale and purchase agreement dated 19 November 2004 between the plaintiff and defendant has in any event become void as the purchase price was not paid in full by the defendant before 31 August 2006;

(e) Alternatively, that this Honourable Court ascertain and declare the date of delivery of vacant possession of the plaintiff's land to the defendant;

(f) A declaration that in any event the said agreement becomes void pursuant to cl. 12 as a result of the defendants failure to pay the purchase price in full;

(g) A declaration that the defendant had breached the said agreement and the power of attorney by continuing building works on the plaintiff's land without settling the purchase price;

(h) A declaration that the defendant had breached the said agreement and the power of attorney by entering into joint venture agreements with third parties without the plaintiff's consent, and had wrongfully sold the plaintiff's land or a part thereof;

(i) A declaration that the defendant, who had taken vacant possession of the said land pursuant to the said agreement and power of attorney without settling the full purchase price, is a trustee and/or a fiduciary for the plaintiff;

(j) A declaration that the defendant had breached its duty as trustee or fiduciary by wrongfully acquiring profits for itself from the plaintiff's land whilst holding the said land as trustee and/or fiduciary;

(k) A declaration that the defendant is a constructive trustee for all income and profits received from the sale and tenancy on the plaintiff's land; and

A (l) An order that the defendant accounts for all income received from the sale and letting of the plaintiff's land and for all profits acquired by it.

Decision Of The High Court

B **[63]** The High Court, after a full trial, held that the extended completion date of the SPA was on 21 May 2006. As the appellant failed to pay the balance purchase price by that date, there was a total failure of consideration and the respondent was entitled to repudiate the SPA. By reason thereof it granted the C declarations and orders sought by the respondent which included, *inter alia,* the following:

(i) that vacant possession of the said land was given by the respondent to the appellant on 21 November 2005;

D

(ii) that the appellant had failed to pay the balance purchase price and further interest on or before 21 May 2006 and that the 10% deposit paid by the appellant be forfeited;

E (iii) that the appellant redeliver vacant possession of the said land to the respondent within two months of the date of judgment;

(iv) that the SPA dated 19 November 2004, is null and void as the purchase price was not paid in full by the appellant F before 31 August 2006;

(v) that the SPA is in any event void by reason of cl. 12 due to the appellant's default in paying the purchase price in full;

G (vi) that the appellant had acted in breach of the SPA and the power of attorney by proceeding with the construction without payment of the purchase price;

(vii) that the appellant is a constructive trustee for all income and profits received from the sale and rentals on the respondent's H land.

(viii) that the respondent refund the sum of RM5.15 million including interest at 4% p.a from 8 June 2010 till the date of payment to the appellant.

I

[64] In addition, the High Court also made an order that an assessment be made before the Deputy Registrar to determine:

(i) the income derived from the sales and rents on the land including profits therefrom, to be paid by the appellant to the respondent; and

(ii) the costs of construction of the mall to be paid by the respondent to the appellant.

[65] The court dismissed with costs the counterclaim by the appellant for the following declarations and orders:

(i) that the date of delivery of vacant possession of the land was 28 February 2006;

(ii) that the agreement dated 19 November 2004 had not been validly or legally terminated;

(iii) that the respondent be ordered to accept payment of the balance purchase price of RM25m free from interest and forthwith deliver to appellant the original issue document of title and to do all things necessary for the transfer of the said land to the appellant free from encumbrances;

(iv) that in the event vacant possession of the said land be delivered to the respondent, an account or assessment to be made of monies to be paid by the respondent to the appellant for the enhancement of and/or benefit brought about to the said land by the construction of the Batu Pahat Mall and that the sum of RM5,150,000 be refunded to the appellant with interest.

[66] We reserved our decision after hearing lengthy submissions by learned counsel for both sides. Upon careful consideration of their submissions, both oral and written, and upon scrutinising the voluminous appeal records, I find myself unable to agree with the decision of the learned JC as to the proper construction of the relevant clauses of the SPA and on her assessment of the evidence before her. It was due to the flawed assessment of the evidence before her and the manner she construed the terms of the SPA which led to the erroneous finding of facts by the learned JC.

[67] The learned JC held that the date of delivery of vacant possession was on 21 November 2005. This was based on the construction of special condition 3 and the handwritten note by the appellant's General Manager, Mr Yiap Toon Cheng (DW1) made on the date of the joint inspection of the land on 21 November 2005. For convenience, the handwritten note is now reproduced:

> Date: 21st November 2005
>
> To:
> Atlas Housing Sdn Bhd
> Suite 138, 1st Floor, Johor Tower,
> Jalan Gereja,
> 80100 Johor Bahru BY HAND
>
> Dear Sirs,
>
> **Re: Sale and Purchase of Property held under Geran No. 101840 Lot 325 Mukim Simpang Kanan District of Batu Pahat**
>
> **Vendor: Atlas Housing Sdn Bhd**
>
> **Purchaser: Dream Property Sdn Bhd**
>
> I, Yiap Toon Cheng (NRIC No:) hereby confirm that I have viewed the above property on the 21st November 2005 at approximately p.m. and are satisfied with the state and condition of the said Land.
>
> I hereby accept vacant possession of the said Land on behalf of the aforesaid Purchase.
>
> Yours faithfully,
>
> ....
>
> YIAP TOON CHENG

[68] The appellant contended that the date of delivery of vacant possession would fall on 28 February 2006 because that was the date when the respondent wrote to the appellant and handed over the keys and the school premises. This is what the letter (bearing letterhead of the respondent) states:

Tarikh: 28.2.2006

Kepada
Pengurus
Dream Property Sdn Bhd Serahan Dengan Tangan
Lot 9A, Jalan 223
46100 Petaling Jaya
Selangor.

U/P: Mr Yap

Tuan

Penyerahan Kunci/Premis SJK (C) Hwa Nan (Lama) Di Atas Lot 2566, Mukim Simpang Kanan, Batu Pahat

Pemilik: Atlas Housing Sdn Bhd Kepada Dream Property Sdn Bhd

Kami merujuk dengan perkara di atas. Kami selaku pemilik premis tersebut menyerah kunci/premis yang dinyatakan kepada Dream Property Sdn Bhd.

Segala penjagaan dan keselamatan Hartanah atas Syarikat pihak tuan.

Bersama-sama ini kami menyerahkan kunci tersebut kepada Syarikat tuan.

Sekian, terima kasih.

Yang benar
Atlas Housing Sdn Bhd

t.t

...
Tan Pei Hau
Pengurus

[69] The joint inspection on 21 November 2005 was made pursuant to s. 10 of the Schedule and special condition 3 of the SPA. This was necessary to satisfy the purchaser that the 40 squatters on the land had been cleared and that the school had been relocated before the purchaser could confirm acceptance of vacant possession of the land. The unresolved issue before us is on the date the school had relocated within the meaning of special condition 3.

[70] I have read and reread the alleged confirmation letter dated 21 November 2005 and scrutinised the evidence of the appellant's and respondent's witnesses pertaining to the circumstances which led to Mr Yiap Toon Cheng (DW1), ie, the appellant's representative, making a statement in his handwriting below the pretyped letter handed over by the respondent's representative, ie, Mr Tang Pei Hau (PW2) to DW1. DW1 testified that he refused to sign the pretyped letter given to him by PW2 as he disagreed with its contents. DW1 said:

> They wanted me to sign the pretyped letter confirming vacant possession but I refused because I disagreed with the contents of the letter. Then they insisted that I must sign something to acknowledge that we had conducted the joint inspection, and that the school had shifted. They pressed me to sign something. So, I write in my handwriting below the pretyped letter, a sentence saying that, "I have jointly inspected the school site with the Edwin Tan & Mr Tang and confirm that the school administration has been relocated". (See page 247; vol. 2/9 AR).

[71] At p. 248 of the appeal record DW1 explained:

> The pretyped letter said that I was 'satisfied with the state and condition of the said land'. That was not something I could confirm … That was not something I could do, or was authorised to do. My duty was to go for the inspection, and then report back to Dato' Tang Yeam Soon what I saw at the inspection. I believed that the issue of vacant possession or otherwise would be something for the 2 sets of lawyers to communicate with each other afterwards.

[72] In my view the handwritten note by DW1 is not a confirmation of acceptance of vacant possession of the land pursuant to the SPA but rather a confirmation of fact that the school administration had been relocated. It is not a confirmation of acceptance of vacant possession as envisaged in special condition 3. The special condition 3 requires confirmation by the vendor and the purchaser. DW1, as the purchaser's representative for the joint inspection, had no authority to confirm acceptance of vacant possession as stated in the pretyped letter. The learned JC however held the handwritten note by DW1 as confirmation of vacant possession after making a finding of fact that the school had physically been relocated, in spite of DW1's evidence that he had no authority to confirm the acceptance of vacant possession. In my view, the learned JC had disregarded DW1's evidence and

misconstrued special condition 3 which states that the confirmation is by the purchaser itself. Note that the confirmation that vacant possession is ready to be delivered was made by the vendor itself *via* its solicitors. There was no reciprocal confirmation by the purchaser itself or by its solicitors. The learned JC, with respect, erred in holding "that vacant possession is deemed to have been given" (see para. 45 of her judgment) based on the site inspection and a statement that the school administration had been relocated. DW1's handwritten statement below the pretyped letter was made immediately after the site inspection. It was made in good faith and not an afterthought. What the respondent wanted was a statement as in the pretyped letter, which DW1 said was not within his authority. It is incorrect to construe that vacant possession is deemed to have been given based on the fact that site inspection was held and that DW1 had confirmed that the school administration had relocated. Site inspection is a prerequisite prior to confirmation by the purchaser under special condition 3. A statement of fact that the school administration had relocated is not a confirmation of acceptance of delivery of vacant possession under special condition 3. There was no need for DW1 to make the handwritten note if he had agreed with the content of the pretyped letter.

[73] The appellant's contention that the date of delivery of vacant possession would fall on 28 February 2006 is supported by the respondent's own letter which was referred to earlier. As to this letter, DW1, in his evidence said:

> Yes, on 28.2.2006 Mr. Tang Pei Han managed to deliver to us the keys to the school site. The keys came with a covering letter. It was delivered by hand. (page 250).
>
> The important thing is that, after 28.2.2006 we had full and free access to the school site, without any hindrance, unlike before. That made the difference. After we took possession of the school site on 28.2.2006, the old locks and keys were all discarded. Later we made our own fencing and gates and stationed own security guards. (page 252).

The heading of the letter itself is clear. It refers to handing over of the keys and the school premises. PW2 cannot contradict the content of his letter by giving it a different meaning in his oral testimony at the trial.

[74] Now, who owns and controls the appellant company? DW2 (the Managing Director), in his witness statement said that the shareholders of the appellant are YS Tang Holdings Sdn Bhd, his wife and himself. The shareholders of YS Tang Holdings Sdn Bhd are DW2 and his wife. This evidence is unchallenged. DW2 had testified that he directed DW1 to carry out the joint inspection and to report to him.

Intention Of Parties

[75] I am of the considered view that the special condition 3 should not be read in isolation or by itself. The SPA must be read in its entirety in order to ascertain the intention of the contracting parties when they entered into the contract. The recital to the SPA expressly states that the category of land use for the said property is for commercial development and that the purchaser is desirous of purchasing the said property together with all rights and interests therein. The vendor has agreed to execute a valid and registrable memorandum of transfer to be deposited with the purchaser's solicitors (not the vendor's solicitors), upon execution of the SPA, notwithstanding that only a deposit of RM3,350,000 was paid.

[76] By cl. 13 of the SPA, the vendor agrees to deliver all approvals plans and/other documents pertaining to the proposed construction of commercial building on the said property to the purchaser and/or its duly authorised representatives to deal with the same for all purposes related to the proposed construction of commercial building on the said property and the vendor further agrees to ensure that the aforesaid documents shall be subsisting and valid to enable the purchaser to carry out the aforesaid purpose.

[77] To the appellant, speed and expediency is of paramount importance in the constructions of a commercial complex. Thus, the vendor, in special condition 4 of the SPA expressly agrees to allow the purchaser to gain access to the said property upon execution of the SPA to enable the purchaser to carry out works pertaining to the land, including but not limited to construction. This special condition 4 overrides cl. 5 of the SP which states that the purchaser shall be let into possession of the said property on the date of full payment of the purchase price to the vendor's

solicitors, by virtue of cl. 23 of the SPA. It therefore appears that punctual payment of full price by the extended completion date is not a precondition for the purchaser to enter into possession of the land and to commence construction of the purposed commercial complex known as Batu Pahat Mall.

[78] In special condition 5, the vendor contractually agrees to assist the purchaser in any manner possible in respect of submission of amended plans for the construction of commercial building on the said property for the approval of local authority, including granting a power of attorney to the purchaser for such purpose upon the execution of the SPA. From the terms and conditions of the SPA, it is abundantly clear that the vendor knew the intention of the purchaser in purchasing the land and had agreed to allow the purchaser to commence construction upon execution of the SPA.

[79] This court, in *Federal Flour Mills Bhd v. Fima Palmbulk Services Sdn Bhd & Another Appeal* [2005] 4 CLJ 47; [2005] 6 MLJ 525 approved what Sir John Romily, Master of the Rolls in *Re Strand Music Hall Co Ltd* [1865] 35 Beav 153 at p. 856 said on the construction of a written instrument:

> The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed unless it be impossible to reconcile it with another and more express clause in the same deed. I think I must, if possible, give effect to both these clauses in the articles in question …

[80] It is plain and obvious that this is not an ordinary SPA, pure and simple. The understanding between the parties is such that the purchaser would be permitted to enter into possession of the land immediately upon execution of the SPA to commence construction of the commercial complex. That was the intention of the purchaser when it purchased the land and the vendor knew it from the outset. It was a business-like transaction. When parties hold contrasting views on the date of delivery of vacant possession and on the extended completion date under the SPA the court should lean in favour of a construction which is in accord with commercial realities. (*Mars Equity Sdn Bhd v. Tis 'Ata' Ashar Sdn Bhd* [2005] 1 CJ 513; [2005] 1 AMR 237, *Berjaya*

A *Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 594, *Damansara Realty Bhd, Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464.

[81] The evidence adduced at the trial reflect what actually
B transpired between the parties. Notwithstanding what is stated in cl. 17 of the SPA that time wherever stated is of the essence of the SPA, the vendor did not insist on strict compliance of the terms and conditions of the SPA. The respondent's conduct in its dealings with the appellant in relation to the payment of the
C balance purchase price is obviously inconsistent with its contention that the balance purchase price must be paid by the extended completion date, ie, 21 May 2006.

[82] When the appellant's solicitors sent the bank draft in the
D sum of RM5.15m to the respondent's solicitors on 22 August 2006, being the differential sum between the purchase price and the loan approved by EON Bank to the appellant, the respondent's solicitors accepted it. This was after the expiry of the completion date set by the respondent. They cashed the bank
E draft with the knowledge of their client (the respondent) and retained it on the ground that it would be used to pay the damages for breach of contract by the appellant. At no time prior to 22 August 2006 did the respondent claim any damages against the appellant. Nor did the respondent exercise its right under
F cl. 12 of the SPA to forfeit the deposit paid by the appellant forthwith. If, as contended by the respondent, to which the learned JC agreed, that the SPA is automatically terminated without any need to notify the appellant, the respondent ought not to have accepted the payment of the differential sum, as by
G then, the SPA was already null and void. There is no legal or contractual basis for keeping the differential sum for an entirely different purpose. It was paid pursuant to cl. 4(c) of the SPA and the respondent had no right to withhold it as security for payment of an unascertained future damages in the event the appellant
H would be held liable for breach of contract. This is especially so when there is a provision in cl. 12 of the SPA giving the respondent the right to forfeit the deposit if the balance purchase price is not paid on the extended completion date.

I

[83] The respondent's solicitors did inform the appellant's solicitors in writing that the respondent would forfeit the deposit and apply for an injunction to stop the appellant from continuing with the construction of the Batu Pahat Mall but this was never pursued. It was not the respondent's initial stand that the SPA had been automatically terminated and of no further effect upon appellant's default in paying the balance purchase price by 21 May 2006. Nor did the respondent forfeit the deposit forthwith.

[84] In my view the respondent, by its own conduct, was estopped from contending that the extended completion date was 21 May 2006 and that the balance purchase price must be paid by that date. Time is no longer the essence of the contract. It had waived its right to insist on strict performance of the contract. In my view the appellant was not in breach of its contractual obligations when the balance purchase price was not paid by 21 May 2006. I agree with the appellant's contention that the extended completion date to pay the balance purchase price under special condition 3 would fall on 28 August 2006. The appellant had the means to pay the balance purchase price. The appellant's application for banking facilities was approved on 30 June 2006. On 21 August 2006 EON Bank's solicitors informed the respondent's solicitors of the said approval and sought confirmation from the respondent's solicitors, among others, that:

(i) the appellant had settled in full the differential sum between the purchase price and the loan facility; and

(ii) an undertaking that the respondent would deliver to the EON Bank the issue document of title to the land and that the respondent would refund, on demand, the loan facility in the event the memorandum of transfer could not be registered for any reason. The appellant's solicitors also wrote to respondent's solicitors on 25 August 2006 relating to the said undertaking.

[85] The differential sum was paid by way of a bank draft to the respondent's solicitors on 22 August 2006 which they banked in on 13 September 2006 (p. 1284). EON Bank was prepared to release the loan subject to the undertaking. Yet the respondent's solicitors chose not to reply to the letter from EON Bank's solicitors.

[86] The learned JC in para. 73 of her judgment however held that the appellant failed to comply with cl. 4 of the SPA as the letter of approval from EON Bank was merely a conditional letter of offer and that there was no undertaking from EON Bank or the appellant's solicitors that the loan would be forwarded to the respondent. The learned JC also accepted PW3's (respondent's solicitor) evidence that the appellant could not in any event obtain the release of the loan by 31 August 2006. In my view the learned JC misconstrued the letter from EON Bank's solicitors. No doubt that it was a conditional letter of the offer. But that is only made conditional pending the usual undertaking from the respondent's solicitors before the loan could be released. There is nothing to suggest that the loan would not be released if the undertaking is given by the respondent. The undertaking by EON Bank or appellant's solicitors under cl. 4(d) to forward the loan to the respondent or its solicitors would normally follow as a matter of course once the respondent or its solicitors comply with the request made by EON Bank's solicitors in their letter dated 21 August 2006. It is pure speculation by PW3 to state that the loan could not be released by 31 August 2006. The obvious reason that the loan could not be released was due to the respondent's or its solicitors' refusal to provide the undertaking as requested by EON Bank's solicitors.

[87] It must be borne in mind that EON Bank's solicitors' letter to the respondent's solicitors was issued before the expiry of the extended completion date ie, 31 August 2006. It is also important to note that one of the reliefs sought by the respondent in its amended statement of claim is a declaration:

> that the Sale and Purchase Agreement dated 19th November 2004 between the Plaintiff and Defendant has in any event become void as the purchase price was not paid in full by the Defendant before 31st August 2006 (see prayer d).

[88] The learned JC also granted this relief. If, as contended by the respondent that the extended completion date was 21 May 2006 and not 31 August 2006, why did the respondent ask for this declaration? The learned JC in granting this declaration had contradicted her own finding that the extended completion date was 21 May 2006.

[89] The letter dated 9 January 2006 from the appellant's solicitors to the respondent's solicitors was not an unqualified letter. The content of the letter is clear. It states that 'our client is agreeable to your letters dated 21 December 2005 and 22 November 2005 to us provided we have your client's written confirmation and/or warranty that with the handing of vacant possession our client shall enjoy quiet possession and there shall be no further interference from the school …'.

[90] So, when the appellant's solicitors wrote to the respondent's solicitors on 28 February 2006 that vacant possession was only given on that date, it should not be held against the appellant or that the appellant was estopped from denying the content of its solicitors' letter dated 9 January 2006. It is not denied that the appellant was late in stating its position that vacant possession was only given on 28 February 2006 but the position taken by the appellant was communicated to the respondent well before the expiry of the respondent's extended completion dated (21 May 2006).

[91] The fact that the appellant proceeded with the construction of the commercial complex after receiving the letter from the respondent's solicitors to cease further construction could hardly be said as acting in bad faith, as was held by the learned JC. This is because that letter was written after the expiry of the extended completion date ie, 31 August 2006. Had the respondent's solicitors given the undertaking as requested by solicitors for EON Bank and acted promptly to an urgent plea by the appellant's solicitors to issue the said undertaking, the loan would have been released by EON Bank to the respondent or its solicitors and that there would not be any failure of consideration.

[92] It is settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (*UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785. It is undesirable for the court, sitting in exercise of its appellate jurisdiction, to disturb the findings of the trial court unless it appears that those findings are clearly wrong. It is more undesirable to do so where the conclusions reached were to a

large extent depend on the credibility of the witnesses and the impressions formed by the trial court which has seen them and judge their honesty and accuracy. (*China Airlines Ltd v. Malta Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 at p. 175).

[93] Upon a critical evaluation of the evidence adduced at the trial and after having heard and considered the submissions of the parties, both oral and written, I find that this is a fitting case which justifies appellate intervention. With utmost respect and for the reasons as stated above, I find that the trial court was plainly wrong in its construction of the terms and conditions of the SPA, in particular, special condition 3. There was insufficient judicial appreciation of the evidence by the trial court, which resulted in the wrong findings on the date of delivery of vacant possession and the extended completion date. The flawed assessment of the evidence had also resulted in the trial judge contradicting herself, which is self evident from her grounds of judgment.

[94] Under special condition 3 and s. 10 of the Schedule there must first be a joint inspection prior to confirmation by the purchaser of the delivery of vacant possession. Vacant possession cannot be 'deemed to have been delivered' as was held by the trial court, 'once the purchaser has inspected and confirmed that the school has relocated'. DW1, who did the joint site inspection with PW2, did not sign the pretyped letter as he had no authority to do so. The respondent's letter dated 28 February 2006 clearly showed that the keys and the school premises were handed over to the appellant on 28 February 2006. The evidence adduced at the trial shows that the appellant had not enjoyed quiet possession prior to that date, notwithstanding that the school had physically been relocated.

[95] If, as was held by the trial judge that the SPA had been automatically terminated by virtue of cl. 12 of the SPA, there was no need for the respondent to seek a declaration, which the court granted, that the SPA is null and void as the purchase price was not paid in full by or before 31 August 2006.

[96] The respondent by its conduct in accepting the differential sum after the expiry of the extended completion date ie, 21 May 2006, had waived its rights to insist on strict compliance of the special condition 3 of the SPA. It is thus estopped from contending that the appellant failed to pay the balance purchase price by 21 May 2006 (respondent's completion date).

[97] Had the trial court made a proper evaluation of the evidence before it, it would have come to the conclusion that there was no total failure of consideration and that the appellant would be able to pay the balance purchase price on or before 31 August 2006. EON Bank could not release the balance purchase price as it failed to get an undertaking from the respondent or its solicitors, despite of the appellant's solicitors plea to respond on an urgent basis.

Conclusion

[98] I therefore allow the appellant's appeal with costs. My decision in allowing this appeal is only in respect of that parts of the order of the High Court which are specified in the appellant's notice of appeal dated 21 November 2011.

[99] With respect to the appellant's appeal against the dismissal of its counterclaim, I allow the appellant's appeal in respect of para. 32(a), (b), (c) and (d) of its counterclaim, ie,:

(a) A declaration that the true date of delivery of vacant possession of the said land was 28 February 2006;

(b) A declaration that the sale and purchase agreement dated 19 November 2004 has not been validly or legally terminated;

(c) An order that the respondent do accept payment from the appellant the balance purchase price of RM25m and that upon receipt of the said balance purchase price the respondent do forthwith deliver to the defendant the original issue document of title to the said land and do all other things necessary to enable the said land to be transferred free from encumbrances to the appellant; and

(d) The parties be at liberty to apply in relation to para. (c) of the counterclaim.

[100] As for interest, I make an order that the appellant do pay interest at 7% p.a on the said sum of RM25m calculated from the commencement of the extended completion date until full settlement of the balance purchase price. This order on interest is made pursuant to special condition 3 of the SPA.

[101] In addition, I also make an order that the appellant do pay to the respondent the differential sum of RM5.15m, which had been returned to the appellant, free from interest. This sum must be paid within 60 days.

Cross Appeal

[102] The cross appeal by the respondent in respect of the trial court's decision on the issue of fiduciary relationship is dismissed with cost. As for the cross appeal on assessment for unjust enrichment, this is rendered irrelevant in view of my decision in allowing the appeal by the appellant.

[103] By consent a sum of RM30,000 shall be paid by the respondent to the appellant as cost. Deposit is refunded to the appellant.